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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARRY LEE DEBARO,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

2249
v. 3449
No. 20,817 ✓

*See Vol.
3416*

APPELLANT'S REPLY BRIEF

WINSTON & KATZ
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San Francisco, California 94104

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FILED

OCT 30 1967

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HARRY LEE DEBANO,

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No. 20,817

APPELLANT'S REPLY BRIEF

I. THE DISTRICT COURT ERRED BY ADMITTING THE
TESTIMONY OF AGENT RAUCH WHICH TESTIMONY
CONCERNED ITEMS SEIZED AS A RESULT OF AN
ILLEGAL SEARCH OF APPELLANT'S HOME.

Appellant in his opening brief urged that there was error in admitting the testimony of Special Agent Rauch principally because portions of Mr. Rauch's testimony was drawn from information obtained during a search of Appellant's home, which search Appellant argues was conducted in violation of the Appellant's rights under the Fourth and Fifth Amendments to the United States Constitution. Appellee, however, in his brief, suggests that all was proper in that an arrest warrant had previously been obtained and that once the arrest was effected a search thereafter would be valid as a search "incident to lawful arrest." (Brief of Appellee, hereafter referred to as BA, 5)

In other words, Appellee, in his argument, fails

to reach the very issue of the application of the law to the facts of this case. For it is conceded that a search without a warrant may be proper when committed "incident to lawful arrest", but implicit in such an exemption is the recognition that the arrest is performed while in "hot pursuit" as distinguished from the present situation in which Appellant is invited to return to his own home for the purposes of arrest even though the Appellant offers to turn himself into the appropriate officials away from his home. The issue which here seems overlooked is that no warrant had theretofore been obtained seeking authority to conduct a search on the very premises to which the agents had gone for the purpose of making the arrest. And it is nowhere denied by Appellee that the time and even the opportunity for obtaining a valid search warrant was not available. To support the search and seizure in the instant case is to defeat the protection established by the requirement for showing cause for obtaining a search warrant.

Additionally, Appellee would have the court refer to the case of Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, (1967), on the matter of whether or not a search may be conducted for mere evidence alone. We submit that such a new rule ought not held to be retroactive, for where the Appellee relies upon the Johnson case,

Johnson v. New Jersey, 384 U.S. 719 (1966), to hold that Miranda decision, Miranda v. Arizona, 384 U.S. 436 (1966), is not applicable to trials which began prior to the Miranda decision (BA:9), so then, by way of consistency ought Appellee to be bound to pre-Hayden rules, and specifically here the rule that denied a search in 1965 solely for the production of evidence wherein no prior search warrant was obtained. As pointed out in the Appellant's Opening Brief, the agents here were not truly seeking instrumentalities of a crime, nor contraband, but rather mere evidence.

Furthermore, the Fourth Amendment to the United States Constitution does not require police officers to delay in the course of investigation if to do so would gravely endanger their lives or the lives of others. Warden v. Hayden, 387 U.S. 294 (1967), while in the reasons for the search as offered by Appellee in this case there is no showing that there was any such urgency relating to danger to life justifying a warrantless search. It is noteworthy that in the Hayden case the warrantless arrest was made upon a fleeing robber, whereas in the instant case the arrest was made coolly upon a non-hostile, non-fleeing arrestee.

In the instant case, officers were present in Appellant's home for two hours where the Appellant was

not present, yet there is no showing of probable cause that a felony was being committed in their presence at the time of the arrest in February 1965 where the indictment referred to an allegedly illegal transportation in May or June of 1964. Nor was any evidence introduced which would support a cause for belief that a felony was being committed by Appellant at the time of his arrest.

It yet appears that if the government may rely upon a broad interpretation to permit them to arrest where they please and search as "incident to the arrest" without bothering with the formalities of applying for a search warrant where time does so permit, this procedure is to in effect render nugatory any requirement for a search warrant, following an arrest. Thus creating almost an open field day for officers to obtain an arrest warrant, search, and then declare no need for a search warrant. Why then even bother with the arrest warrant?

We submit such liberality of permitting a warrantless search when applied here would support a conviction based upon a search over which constitutional safeguards have by trick or stratagem and choice ignored the very intent of the constitutional safeguard against an unwarranted search.

The search here must be examined in light of United States v. Rabinowitz, 339 U.S. 56 (1950), upon which Appellee also relies (BA:5). If applied to the facts in the instant case the Rabinowitz case would deny the validity of this search as one incident to lawful arrest in that the technique applied by the arresting officers here constituted an unreasonable vehicle for any warrantless search. It is to be remembered in this matter that there had been an arrest warrant issued the prior day and no showing was made before or at the trial as to why no search warrant was sought. Had the arrest been at the Appellant's place of employ, or in front of his home, or at the police station where Appellee offered to meet the agents, no such search of Appellant's home would be justified short of a warrant for a search. Yet by waiting inside Appellant's home for his return is to create a fortuitous situation in the hopes of proceeding in the absence of a warrant. To argue that no officer would be fool enough to permit Appellant to turn himself in at Appellant's convenience as Appellant had offered is to overlook the practical matter that Appellant upon hearing by telephone that he was to be placed under arrest, could well have fled and not returned home to face the warranted arrest and the unwarranted search.

In Rabinowitz, the arresting official was armed

with a valid arrest warrant for one charged with selling and having in his possession forged and altered government stamps. The five justices who formed the majority opinion permitted this search as incident to lawful arrest not because of the warrant but because the officers here had probable cause to believe that a felony was being committed in their presence. In Appellant's case, however, there was no showing by arresting officers, or anyone, of a probable cause that a felony was being committed in their presence at the time of the arrest in February, 1965. The arrest followed from an indictment referring to the alleged unlawful transportation in May and June of 1964.

The point remains that at the time of the search, a warrant for mere evidence should not have been granted to the arresting officers, for a warrant would not then issue for mere exploration to uncover evidence. See Davis v. U.S., 328 U.S. 582. Why should the Appellee be allowed to have accomplished by indirection (deliberate search of premises following an alleged arrest and without benefit of an appropriately obtained search warrant) that which the Constitution and cases thereunder specifically prohibit?

We submit that any data, records, or other items recovered by the search, and referred to in the testimony of the agent as items having been observed at the premises,



as well as the testimony later describing the relationship between the records and magazines, et al. and the nature of the charges facing the Appellant, ought not to have been admitted and that the admission thereof of such testimony was by its nature unfairly prejudicial to the hearing in this matter. In short, it was improper for the District Court to have admitted any such evidence resulting from the search conducted in this case upon the premises of the Appellant at the time of Appellant's arrest.

II. THE GOVERNMENT'S FAILURE TO RECORD TESTIMONY DURING GRAND JURY PROCEEDINGS DID NOT DEPRIVE APPELLANT OF A FULL AND FAIR TRIAL.

During the trial, Appellant had requested a transcript of the testimony given by WANDA BRATSOULEAS before the Grand Jury (TR 167-169). The purpose of such request was suggested at trial where said witness Bratsouleas changed her story on several occasions upon direct examination alone, leaving her credibility subject to reasonable challenge (TR 36-37). It would be pertinent for corroboration and/or impeachment, for the jury to observe the relationship between what she said at the time of the Grand Jury and what she said months later at the trial. The request was denied when it was learned that no such record had been kept (TR pp 167-169).

It is submitted that the Appellant was unduly prejudiced wherein the rule which permits the examination

Grand Jury testimony (See U.S. v. Giampa, (1961) 290F.2d 83) is ignored by the application of an alleged policy in this District that does not require the taking of such testimony.

Appellant was not present at the Grand Jury hearings and cannot know whether testimony was taken in transcript. How easy it would be, however, for testimony to be taken in all cases, but retained only when deemed advantageous to the government. That other Circuits have established that the government has no obligation to record Grand Jury testimony does not appear persuasive in determining prejudice to an accused.

It may be asked how could one think so ill of government procedures? In this very case a letter was addressed to the F. B. I. agent by the chief prosecution witness, the victim, the prostitute (TR 190-193). When defense counsel asked at trial for a copy of this he was told that the letter was destroyed; the agent didn't think it was important to keep. Thus when counsel for Appellee indicates at footnote 45 of his brief that we were provided a copy of the witnesses' previous statements to agents of the F. B. I. he misleads this honorable Court, for her previous letter to the agent was destroyed rather than produced.

• We urge that the keeping of Grand Jury minutes is a necessary safeguard against a witness, such as in this

trial, who has changed her testimony 180 degrees within a ten minute period exclusively on direct examination. Then how reliable was an indictment based upon such a witness's story? or a conviction?

Counsel for Appellee would have us at least show cause for production of such records, after already having conceded that with or without cause no such record was available. The Judge, without reference to any such cause however, disposed of the objection on the mere non-availability of any such record (TR 167). Furthermore, the cause was stated at the trial by counsel for Appellant in indicating that such transcript was required for purposes of impeachment (TR 168).

Finally we note that Counsel asks that we take another route if we are unsatisfied with the procedures by which Grand Jury minutes may or may not be recorded at the whim of the U. S. Attorney, namely, that we take the matter up with the U. S. Attorney, for the Northern District of California (Cecil Poole). But we here urge that whatever remedies are available to one to improve fairness in the administration of justice, do not in any way preclude this Court from properly finding that until such cure is imposed by law, an Appellant is nevertheless entitled to a consideration by this Court of whether or not the absence of such testimony, and/ or a record thereof, "is harmful and prejudicial to the substantial rights

of a defendant.

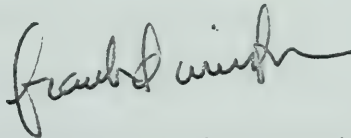
We submit that the lack of availability of a transcript of testimony of Grand Jury proceedings which testimony is properly requested denies to an Appellant a fair trial, and as applied in this case constitutes cause for reversal of the conviction and judgment below.

III. CONCLUSION

For these reasons and those set forth in Appellant's Opening Brief Appellant respectfully submits that the judgment of the Court below ought be reversed, and the charge against said Appellant be hereby dismissed.

Respectfully submitted,

WINSTON & KATZ

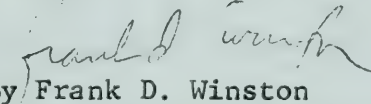
A handwritten signature in dark ink, appearing to read "Frank D. Winston", written in a cursive style.

By Frank D. Winston, Attorney

Dated: October 27, 1967

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

WINSTON & KATZ


By Frank D. Winston
Attorney for Appellant

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the County of San Francisco. I am over the age of eighteen years and not a party of the within above entitled action; my business address is 986 Mills Building, 220 Montgomery Street, San Francisco, California. On October 30, 1967, I served three copies of the within Appellant's opening brief on the Appellee in said action, by placing 3 true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at San Francisco addressed as follows:

United States Attorney
450 Golden Gate Avenue
San Francisco, California

Attn: Jerrold Ladar, Esq.
Assistant United States Attorney

I certify (or declare), under penalty of perjury, that is true and correct. Executed on 30 October, 1967 at San Francisco, California, /s/ Joan Graham

NO. 21818

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER ADAMS,)
)
 Appellant,)
)
 vs.)
)
 UNITED STATES OF AMERICA and)
 CALIFORNIA STEVEDORE & BALLAST)
 COMPANY,)
)
 Appellee.)
 _____)

APPELLANT'S OPENING BRIEF

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SEP 25 1967

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The jurisdiction of this Court lies under 28 U.S.C. §1291, by reason of the Notice of Appeal filed March 21, 1967, after final judgment entered and an order denying plaintiff's motions under Rule 52 (b) and 59 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

This is a libel in personam seeking damages for personal injuries sustained by plaintiff aboard the *U.S.N.S. PRIVATE JOSEPH F. MERRELL* (hereinafter referred to as *MERRELL*) while he was engaged in loading cargo.

Plaintiff's libel states two causes of action: Unseaworthiness of the vessel *MERRELL* and negligence of the defendant U.S.A.

The defendant United States of America, answered plaintiff's libel, denying its substantive allegations, and impleaded California Stevedore & Ballast Company, plaintiff's employer, as third-party defendant.

The matter was tried before the HON. ALBERT C. WOLLENBERG, Judge of the United States District Court for the Northern District of California. Judgment was rendered against plaintiff. Motions under Rules 52 (b) and 59 of Federal Rules of Civil Procedure were timely filed and denied. Notice of Appeal was timely filed.

STATEMENT OF FACTS

WALTER ADAMS is a negro longshoreman who has had the benefit of a fifth or sixth grade education (R.T. 50). He has been a longshoreman for more than twenty-three years (R.T. 48). On the night of April 23, 1962, he was employed by California Stevedore & Ballast Company, to load cargo aboard the vessel *MERRELL*, which was moored at the Oakland Army Terminal, Berth 6W. Plaintiff started to work at 7:00 p.m. in the No. 2 hatch, lower hold of the *MERRELL*. The loading process consisted of stowing large "conax" vans, about seven to nine feet in height, and then "topping off" with smaller cargo, i.e., hand stowing smaller cargo such as boxes of small arms ammunition on top of the conax vans up to the overhead or ceiling. After the conax vans were "topped off", a few more vans would be loaded in the hold and the "topping off" process repeated (R.T. 3-6). The small arms ammunition was loaded on wooden pallet boards known as Army boards. An Army board is a "four-foot by six-foot board constructed of *two by ten* or *two by eight* planking, with *four by four* stringers, double faced board" (R.T. 144, lines 16-23; R.T. 171, lines 19-25, emphasis added). A normal load of small arms ammunition on an Army board would weigh between 2000 and 2400 pounds and would consist of from thirty-two to thirty-six boxes depending on the weight and size of each box (R.T. 172).

These Army boards with their loads of small arms ammunition would be lowered into the hatch by means of the ship's winches. Eight longshoremen were assigned to the No. 2 hatch, lower hold, however, four men were doing the operation while the other four men rested. The four men who were working, were divided into two teams, one working the inshore side of the hold, the other the offshore side. There were two fork-lift trucks in the hold, one for each side of the hold (R.T. 6). When an Army board of ammunition would come into the hold, WALTER ADAMS would pick it up with the fork-lift truck and drive to the conax van. There he would hoist the Army board up into the air until it was level with the top of the conax van. After turning off the engine and blocking the wheels, he would climb up the fork-lift, step across the side of the Army board to the top of the conax van and help his partner, a fellow longshoreman, stow the cargo on top of the conax van (R.T. 6-7; 36-37). The partner would get to the top of the conax van by standing on the side or edge of the Army board as it was raised in the air. When it reached the level of the top of the conax van, he stepped off the Army board onto the van. This is a normal, customary method of getting longshoremen to the top of the van (R.T. 200-201; 54). On the opposite side of the hold, the same operation would be

taking place with another team of two longshoremen. This same operation was done the night before (R.T. 56, 57).

Approximately an hour after the operation started, as plaintiff was stepping across the Army board to the top of the conax van, one of the boards of the Army board broke causing plaintiff to fall to the deck below landing on his shoulder (R.T. 52, 53). As a result of the accident, the plaintiff was off work a little over three months (R.T. 71) and since returning to work, has been on dock exemption (R.T. 72-74).

SPECIFICATIONS OF ERRORS RELIED ON

1. The Fifth Finding of Fact of the District Court is not supported by the evidence.

2. The Sixth, Seventh and Eighth Findings of Fact of the District Court are not relevant to the issues which were tried by the District Court.

3. The Third Conclusion of Law of the District Court is erroneous in that, as a matter of law, the evidence establishes unseaworthiness of the vessel *MERRELL*.

4. The Fourth Conclusion of Law of the District Court is not supported by the evidence.

ARGUMENT

Appellant wishes to point out, at the onset, that the Findings of Fact and Conclusions of Law under scrutiny were prepared by counsel for appellee United States of America. Appellant realizes that this fact does not minimize the effect of the trial court's decision, however, he believes that it helps explain some of the incongruities contained in the Findings and Conclusions under discussion.

*A. THE FIFTH FINDING OF FACT IS NOT
SUPPORTED BY THE EVIDENCE.*

Finding five quotes from section 9.67 of the Safety and Health Regulations for Longshoring, U.S. Department of Labor, (29 C.F.R. Part 9) which states, in part, that "pallets shall be of such material and construction and so maintained as to *safely support and carry loads* being handled on them " (our emphasis). In effect, this section imposes a standard of strict liability upon the shipowner or stevedore company. Most regulations, ordinances and the like contain specific standards or criteria. If one satisfies those specified standards initially he cannot thereafter be found to have violated the regulation. Here we have an opposite situation; a violation of the regulation can only be determined after the fact. In other words, to comply with this section one cannot

say that because the pallet is made of this kind of wood and of that size and constructed in this way it therefore meets the standards prescribed. The only test or standard for compliance with this section is, "did the board safely support the load."

The Court answers this question by saying that the board safely supported the *load* of small arms ammunition and failed only when plaintiff stepped on the edge. Therefore, the Court concludes, the board was fit for its intended purpose, i.e., "safely supporting the *load* of small arms ammunition" (our emphasis). Referring again to section 9.67 of the Longshore Regulations pallets must, "safely support and carry loads" (our emphasis). The term "loads" is not restricted to small arms ammunition or to inanimate objects or, for that matter, is it restricted to cargo. A man standing on a pallet board is just as much a "load" as is a box of small arms ammunition. It would be more than incongruous to say that the section was meant to protect inanimate objects placed on pallet boards but not animate ones.

Furthermore, the evidence is uncontradicted that pallet boards are intended to be used by longshoremen as a means of carrying or conveying them to working places above the deck (R.T. 200, 201). Indeed, the only adverse witness

who testified as to the use of pallet boards as a means of getting to working places above the deck was K. B. GRANSTEDT.

He was asked at page 200, lines 16-21:

"You stated that these men would sometimes go up on the lift on a board. Would they go up on an empty lift, on the forks?

His reply:

"They're not supposed to go up on forks. *If you have a load there they'll step on,* or if you have an empty board there they'll step on" (emphasis ours).

In addition to the undisputed testimony of the witnesses, General Industry Safety Orders, #3299.8, *Safety Orders Applicable to Longshore and Waterfront Operations*, State of California, June 1957 (page 14), states:

"Pallets shall be constructed and maintained with strength adequate for the loads being handled. They shall be kept in good repair. *Pallets upon which employees customarily walk* shall have *no surface* opening in excess of two inches in width" (our emphasis.)

This section is a clear legislative expression that pallet boards are walked upon by longshoremen. Neither of the sections referred to above limit the adequacy of the strength of the boards to their centers. In fact, the latter section, by using the words "no surface", indicates that the entire pallet board must be of adequate strength. The par-

ticular board in question was four feet by six feet in length and width, and constructed of two inch by ten inch or eight inch planking with four inch by four inch stringers, double faced (R.T. 144). The board was designed to hold loads in excess of twenty-four hundred pounds (R.T. 172). The side or edge of the pallet board is the area where the bridle is attached; and the side or edge of the pallet board supports the weight of the load when being lowered into the hold (R.T. 34, lines 23-25; R.T. 35, line 1). Longshoremen are expected to stand or walk upon the edge of these boards (R.T. 200, lines 16-21); there is no reason for them not to if the board is safe (R.T. 200, lines 24-25; R.T. 201, lines 1-3). In short, there is no rule, no reason and no evidence which limits the adequacy of protection to one portion of the pallet board.

No one has stated the issue more clearly than appellant: "If that board don't break, I don't fall!" Unfortunately, the Court below never decided the issue; instead, most of its time was spent in a casuistical analysis of non sequiturs.

*B. THE SIXTH, SEVENTH AND EIGHTH FINDINGS
OF FACT ARE IRRELEVANT TO THE ISSUES
WHICH WERE BEFORE THE LOWER COURT.*

The Court concludes in the sixth finding of fact

that if all eight men in the lower hold had been working simultaneously, the appellant would not have had to leave the seat of the fork-lift. The seventh finding of fact concludes that the "four on, four off" practice was a proximate cause of the accident. The eighth finding of fact concludes that the leaving of the driver's seat of the fork-lift with the forks in the air was a proximate cause of the accident. And the fourth conclusion of law embodies the essence of each of these findings. Each conclusion in finding six, seven and eight fails to mention that if the board did not break, the accident would not have happened.

In each finding, the Court concludes that the plaintiff indulged in an unsafe or improper practice, yet every alleged improper practice had ceased or come to rest by the time he stood on the pallet board. Thus, at the time the board broke and appellant fell, the fact that four men were working instead of eight is irrelevant. The evidence clearly demonstrates that whether four men are working or eight men, they still must use the pallet board as a means of getting to the top of the conax van. Similarly, if leaving the seat of a fork-lift with a load suspended is improper, the impropriety of this³ activity ceased or came to rest before he stepped on the pallet, e.g., if appellant fell because he stood on the seat of the

fork-lift or if he fell while climbing up the fork-lift or if, in leaving the fork-lift unattended, it rolled back and hit him, then it might be said that plaintiff's activity was a proximate cause of the accident. But here each of those possibilities disappeared: he had safely reached the pallet board. The board would have broken when plaintiff stood on it with or without a driver seated behind the wheel of the fork-lift.

Clearly, appellant was a member of a class for whom safe and adequate pallet boards were intended; clearly, it is foreseeable that longshoremen are expected to stand on pallet boards be it the middle or on the side of them. Just because appellees did not foresee that it was WALTER ADAMS who was going to step on the pallet board instead of another longshoreman should not defeat their liability.

C. THE VESSEL WAS UNSEAWORTHY AS A MATTER OF LAW.

The Court below never decided if the pallet board broke. Yet it erroneously concluded in the third conclusion of law that the evidence did not establish that the *MERRELL* or its appurtenances were unseaworthy. Opposing counsel, in their "Memorandum in Support of Proposed Findings of Defendant United States" at page 2, lines 3-6 (page 136 of the Transcript of Record), state:

"But a finding by the Court as to whether or not the board broke is not determinative of the issues presented. Even if the pallet board did break, it does not establish that the vessel was unseaworthy."

And again at page 3, lines 11-15 (page 138 of the Transcript of Record):

"The Government's proposed findings do not require that the Court act on the issue of whether or not the pallet board broke. Rather we suggest that the Court need only reach the issue of whether or not the board was reasonably fit for its intended purpose."

It is appellant's position, as heretofore stated, that the Court must decide if the board broke before it can decide if it were reasonably fit for its intended purposes and therefore whether or not the vessel was unseaworthy.

A case of striking similarity to this one is *Reed vs. THE YAKA*, (D.C. Pa. 1960) 183 F. Supp. 69. There a longshoreman was standing on pallet boards, used as staging, in order to help guide drafts of cargo being lowered into the hold. While standing on one of the pallet boards, it broke causing Reed's right foot to fall through the boards thus twisting his ankle.

The Court, sitting in Admiralty, found that, "The sole cause of this injury was the latent defect in the wooden pallet being used for staging." The Court therefore concluded

that, "The *S.S. YAKA* was unseaworthy."¹ The rule of the *YAKA* case squarely embodies the facts of this case.

CONCLUSION

The decision of the lower Court is contrary to the law and the evidence. Most of the evidence set forth in the Findings of Fact is completely irrelevant to this case. The issue which should have been decided, was not decided. If it had been decided, WALTER ADAMS would not be an appellant. Either the board broke or it did not. If it did, then the vessel *MERRELL* was unseaworthy. *Reed vs. THE YAKA, supra*.

It is respectfully requested that this case be reversed and a new trial ordered.

¹ This case was reversed by the Third Circuit on different grounds. 307 F. 2d 203, 1963 A.M.C. 672. Thereafter, the United States Supreme Court reversed the Third Circuit. 373 U.S. 410, 1963 A.M.C. 1373.

Dated: San Francisco, California, September 23, 1967.

Respectfully submitted,

DORSEY REDLAND
JOHN A. McGUINN

Attorneys for Plaintiff and Appellant

CERTIFICATE OF CONFORMANCE

I certify that, in connection with the preparation
of this brief, I have examined Rules 18 and 19⁴³⁹ of the United
States Court of Appeals for the Ninth Circuit, and in my opinion
the foregoing brief is in full compliance with those rules.

DORSEY REDLAND

No. 21818

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER ADAMS,

Appellant,

vs.

UNITED STATES OF AMERICA and
CALIFORNIA STEVEDORE & BALLAST
COMPANY,

Appellees.

BRIEF FOR THE UNITED STATES

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NOV 24 1967

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 21818

WALTER ADAMS,

Appellant

v.

UNITED STATES OF AMERICA

and

CALIFORNIA STEVEDORE &
BALLAST COMPANY,

Appellees.

BRIEF FOR THE UNITED STATES

JURISDICTIONAL STATEMENT

This is an action to recover damages for personal injuries allegedly sustained by Appellant longshoreman while working in the hold of Appellee's vessel. Jurisdiction exists under the Public Vessels Act, 46 U.S.C. §§781 et seq., and 28 U.S.C. §1291 by reason of Appellant's Notice of Appeal filed on March 21, 1967, after final judgment and order denying motions under Rules

52(b) and 59 of the Federal Rules of Civil Procedure.

COUNTERSTATEMENT OF THE CASE

1. The Facts

The facts of this case are essentially embodied in the District Court's findings of fact. Appellant has for the most part accurately stated the salient facts in his opening brief, with the glaring exception that the trier of fact could not make a finding, from the evidence submitted, that the pallet board did in fact break.

Briefly, Appellant is a longshoreman who was working in the No. 2 hold of the Government vessel, PVT. JOSEPH F. MERRELL. He was part of an eight man gang stowing boxed ammunition into the wings of the hold. Because of a so-called four on, four off system, only four of the eight men were working at the time of Appellant's alleged injury. As a result, Appellant was obliged to drive the fork lift truck, raise a fully loaded pallet to a level of seven to nine feet, leave the seat of the truck, climb up

on the forks, and scramble across the raised pallet to hand stow the boxes of ammunition. All this, while the four "off duty" longshoremen, gazed on.

Appellant alleges that the pallet board broke, thereby causing his fall. There were no eyewitnesses.

Appellant brought his action in the district court alleging negligence of the United States and unseaworthiness of MERRELL.

2. The District Court Decision

After considering the evidence, Judge Wollenberg concluded that Appellant's evidence failed to establish that the United States was negligent or that MERRELL was unseaworthy. The sole causes of the accident were held to be Appellant's own actions in engaging in the four on, four off system and in leaving the driver's seat of the fork lift truck with a loaded pallet board suspended in the air. Consequently, the United States was held "entitled to a dismissal" of Appellant's action below.

ARGUMENT

THE DISTRICT COURT'S FINDINGS THAT THE UNITED STATES WAS NOT NEGLIGENT AND THAT MERRELL WAS NOT UNSEAWORTHY ARE NOT CLEARLY ERRONEOUS.

- A. The "Clearly Erroneous" test governs this Court's review of the District Court's findings.
-

The standard governing review in this Court of the District Court's findings of fact is so well established as to require little discussion or citation. In the leading case of McAllister v. United States, 348 U. S. 19, 20 (1954), the Supreme Court stated the standard as follows:

In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure.

Accord: States S. S. Co. v. Permanente S. S. Corp., 231 F.2d 82 (9 Cir. 1956); Admiral Towing Co. v. Woolen, 290 F.2d 641 (9 Cir. 1961). This standard applies, of course, to the review of the trial court's findings as to negligence and

proximate cause. E.g., Bartholomae Corp. v. United States, 253 F.2d 716, 720 (9 Cir. 1957); North American Van Lines v. Brown, 248 F.2d 905, 912 (8 Cir. 1957); Safe Harbor Enterprise, Inc. v. Hill, 301 F.2d 139 (5 Cir. 1962).

Under this test, a factual finding may be said to be "clearly erroneous" only when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed". United States v. Oregon Medical Society, 343 U. S. 326, 339 (1952); United States v. United States Gypsum Co., 333 U. S. 364, 395 (1948). Because of its stringency, this test imposes on appellants what has been described by the Supreme Court as an "almost insurmountable burden." International Boxing Co. v. United States, 358 U. S. 242, 252 (1959). As we demonstrate in the following section of this brief, Appellant has failed to surmount that burden.

- B. The District Court's findings are supported by the evidence.

The Court below did not and could not, based on Appellant's evidence, make a finding that the pallet board did in fact break. In short, the Court did not believe Appellant's story. He testified that the board broke and on several occasions demonstrated the manner in which it allegedly broke. The record indicates that the Court closely watched these demonstrations (T. 52, 64, 65). 1/Appellant testified that he examined the pallet board before he stepped on it, and yet, when asked at trial whether the board in use at the time of the accident was an "Army board" (bigger and heavier than the board used at trial), he could not remember the type board used at the time of the accident (T. 59-60, 88-90). The record clearly shows that Appellant brought into court a decrepit and broken board in hopes, it is submitted, of influencing the trier of fact (T. 123-6).

Appellant's fellow longshoreman testified that he saw a broken piece of wood on the deck,

1/ "T.", as hereinafter used, refers to the transcript of trial proceedings.

but denied that there was any other wood or dunnage to block the wheels of the fork lift (T. 113). By failing to find that the injury occurred as alleged by Adams, the Court inferentially disbelieved him.

A motion for a new trial was made, fully argued and denied. Further, the decision below was not rendered from the bench at the conclusion of trial, but rather at a later date after the trial court had had sufficient time to reflect upon and consider all the evidence and argument. By post trial briefs the Court was made aware of all possible ramifications of this matter and consciously chose to deny recovery.

Appellant now argues that the word "load" included in the provisions of Section 9.67 of the Safety and Health Regulations for Longshoring (29 C.F.R. Part 9) is not restricted to inanimate objects or cargo and urges that the provision imposes a standard of strict liability upon the shipowner or stevedore. Appellant's argument fails in two respects. First, he assumes that the pallet board broke. As noted

earlier, the district court made no such finding and it is just as probable, if not more so, that Appellant slipped off the pallet board. Second, while riding a pallet board on a fork lift truck may be a fact of life in longshoring, it remains that it "is not a cautious act" and can be considered as negligence. Overton v. Pope & Talbot, Inc., 296 F. Supp. 978, 980 (E. D. Pa. 1967).

Appellant admitted that he considered using a ladder but decided that the use of a fork lift was safer since a ladder "could break" (T. 58).

Appellant would determine liability for a defective pallet board only after the fact. Does this mean that all reason is rejected and that a shipowner will be liable if four 200 pound longshoremen climb onto a fully loaded pallet on a fork lift truck? Does this further mean that a longshoreman can negligently balance at the edge of a pallet board and still be entitled to recovery from a shipowner if he is injured? The fallacy of Appellant's argument is obvious. Appellant failed to prove that the pallet board broke, and yet, in this Court, urges the

application of strict liability stemming from an alleged broken pallet board.

- C. The findings of proximate cause embodied in findings 6, 7, and 8 are relevant.

Appellant seeks recovery from the United States based on claims of negligence and unseaworthiness. Any determination of negligence must, of course, include a finding of proximate cause. Therefore, the trier of fact was bound to look for the cause of the accident. Judge Wollenberg found that no conduct of Government employees or agents contributed to Appellant's injury, but rather that Appellant himself, by his own actions, solely caused his injury. It has been admitted throughout these proceedings that although eight men were available in the hold, only four were working at the time of Appellant's fall. If all eight men had been working, Appellant would not have had to leave his seat on the fork lift truck. Safety regulations specifically prohibit a lift driver, such as Adams, from leaving his vehicle unattended when it is in operation. An unattended vehicle must have its forks lowered and power

secured. Section 9.73(j) Safety and Health Regulations for Longshoring [Plaintiff's Exhibit 4]; Rule 1011 of the Pacific Coast Marine Safety Code [Defendant's Exhibit B]. Adams, however, left the driver's position with a loaded pallet raised seven to nine feet (T. 14, 95-96). He then compounded his error by scrambling up on top of the fully loaded pallet.

Nor is it any excuse to say that Adams was needed to help move cargo from the pallet to the wings since there was only one other man to do this work. The applicable union contract specifically provides in Section 10 that when cargo is hand stowed there must be four "serving men" and four "hold men" in addition to fork lift truck drivers. (International Longshoreman and Warehouseman's Union - Pacific Maritime Association Agreement, June 16, 1961 - July 1, 1966, [Defendant's Exhibit A]). Thus, there were, or should have been, an adequate number of men in the hold to handle the cargo without the necessity of Appellant's participation.

Appellant argues that every improper practice "had ceased or come to rest" by the time he stood on the pallet board. The trier of fact determined, and correctly so, that the United States was not negligent, and that Appellant negligently put himself in a dangerous position and thereby solely caused his own injury. The point is graphically illustrated in the case of Salmond v. Isbrandtsen Co., 1953 A.M.C. 1066 (S.Ct.N.Y. 1953). In that case, plaintiff longshoreman was unloading concrete ballast from a ship by the use of a crane and a truck. The plaintiff initially was on the cab of the truck in a position of safety. While the load of concrete was on the way up from the ship's hold, plaintiff left the cab of the truck and climbed over several large pieces of concrete in the truck. He then held up his hands to tell the winchman to hold the load. While the load was in the air, a large piece of concrete fell and hit the plaintiff. The court was unable to find any negligence on the part of the shipowner and denied recovery to the plaintiff, holding that

the negligence, if any, was that of the stevedoring company's foreman. Specifically, the court stated (1953 A.M.C. at 1069):

In all actions for negligence the trier of fact must be able to place his finger and say, "There is negligence." It may not be left to speculation or remote possibility.

In the case at bar, like Salmond, the proximate cause of the accident was the longshoreman's own conduct in negligently placing himself in a position of danger.

D. The "four on, four off" system.

The instant case is of more than passing interest because of the intimate view provided of actual longshoring operations on the San Francisco waterfront. This view cannot help but prove disquieting. In regard to the four on, four off system, the District Court found it "self-evident" that such a system is little more than wholesale cheating by the longshoring gang which resulted in an insufficient number of men to safely do the work. (T.R. 146). 2/

Testifying below as to liability were three longshoremen, including Appellant. They had been

2/ "T.R.", as hereinafter used, refers to the consecutively numbered pages of the pleadings which form the transcript of record herein.

employed as longshoremen in the Bay Area for 23 years, 23 years and 22 years respectively (T. 2, 48, 129). Each was an "A" member of Local 10 of the International Longshoreman and Warehouseman's Union, San Francisco. An "A" member has seniority rights, one of the prime benefits being the opportunity to take night work with its attendant increased hourly wages (T. 31, 106, 117). Appellant and Witness Victor were both working on the "plug" (T. 29, 50) which means they were not regular members of a gang, but free to choose from the available vacancies for the night's work.

The loading operation that night consisted of moving pallets laden with boxes of small arms ammunition from the place of landing in the hold to the wings by means of a fork lift truck. The pallet would then be raised by means of the fork lift until even with the tops of conax vans (rectangular metal vans loaded with cargo) already in place and the individual boxes moved by hand to their place of ultimate stow. Both wings of the ship were being loaded. In the lexicon of the trade, this was a "hand stow" operation which

required eight men in the hold assigned as follows:

- 2 men - drivers of the 2 fork lift trucks
- 2 men - remove bridles from pallet boards;
attach bridles to empty pallet board
- 4 men - on top of conax vans to hand stow
cargo (2 men per side)

In addition to regular breaks, not more than one man can be absent at a time for relief purposes. This man would be one assigned to handling the bridles in the square of the hatch. Each holdman or swingman is considered equal in skills and rotation of jobs would not be unusual. All of this is spelled out in some detail in Sections 10.2, 10.21 and 10.23 of the Pacific Coast Long-shore Agreement(Defendant's Exhibit A). This was all well known to those in the trade, including Appellant (T. 117-119, 155-157, 164-165, 176-178).

Though eight holdmen were assigned to No. 2 hold on MERRELL, only four were working. As to the other four, Witness Victor stated (T. 28, 29):

The Court: Were they doing anything else besides just sitting around?

A. No.

At the end of every hour, the gang members would shift so that the time off was equalized.

As Appellant himself testified, ". . . we work one hour and we'd be off one hour." (T. 61). Needless to say, each gang member drew his full eight hours wage for the time on the ship even though he had only worked four hours (T. 41). This arrangement has been characterized as the four on, four off system.

Thus, at the time of the accident, Appellant and one other man were doing the work of four men. Adams would unhook the bridle from the pallet as it landed in the hatch. He would then mount the fork lift truck, move the pallet into the wing, raise the loaded pallet to the top of the conax vans, dismount to block the wheels of the fork lift, climb up to the top of the conax vans via the fork lift, and scramble across the raised load to assist in hand stowage of the boxes of small arms ammunition. His partner, who was unable to drive the fork lift truck, generally remained on top of the conax vans to assist in the hand stow (T. 54-55, 84-85). Adams was injured when he fell from the raised pallet load as he attempted to reach the cargo "table"

after clambering up the fork lift truck. (T. 52-53).

One of the more surprising features of the case was the determined attempt to justify use of the four on, four off system. It was stated that this has been a "custom" on the waterfront for the past twenty years which continues to this day (T. 11-12, 60-61, 63). Appellant contended that this practice was done with the knowledge of the gang boss, the immediate supervisor of the men, and that more cargo could be handled by using half the gang than by using the full gang (T. 12, 57, 63-64, 120). The witnesses denied that there was any rule prohibiting using the four on, four off system, although the union agreement was said to be the "bible" (T. 12, 106). It was urged that the union agreement did indeed tolerate such a practice (T. 126-127; Plaintiff's Supplemental Trial Brief, T.R. 118-9).

There is, of course, nothing in the Pacific Coast Maritime Agreement which in any way suggests that an employer must employ eight men in the hold to have four work. Kenneth B. Granstedt, a

California Stevedore and Ballast Company employee in overall charge of that company's contract operations at the Oakland Army Terminal, testified as to proper conduct of longshoremen. The four on, four off system is a practice not permitted under the union contract and contrary to direct instructions from the company (T. 179-181). When observed or brought to his attention, Mr. Granstedt stated that he immediately fires the offending gang (T. 181, 191).

One may well ask, then, how this particular gang, or any gang, can get away with this practice. Life on the waterfront has never been noted for its gentle ways. Night work in the Bay Area is almost solely the province of "A" men, those whose seniority to a large extent came from the ingress of workers during World War II (T. 117).

The Army does not supervise the longshoremen - the Government pays for stevedoring on a commodity tonnage rate which is completely independent of longshoremen's wages (T. 148-149). Both the gang boss (immediate supervisor of a gang) and the walking boss (overall supervisor

of entire cargo handling operations for a single ship) are members of the same local as are the individual longshoremen.

From a consideration of all these factors, it is submitted that in addition to being clearly fraudulent, the four on, four off system resulted in Appellant's having to scramble to the top of the load to assist in cargo stowage although there were sufficient personnel in the hold to accomplish the stowage.

E. The pallet board, even if it did break, would not render MERRELL unseaworthy.

The correct test of the duty to provide a seaworthy ship and appurtenances is set forth in Mitchell v. Trawler Racer, Inc., 362 U. S.

539, 550 (1960):

The duty is absolute, but is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness...
(Emphasis added)

Judge Wollenberg found that the pallet board was reasonably fit for the purpose intended, i.e., safely supporting the load of small arms ammunition. (T.R. 145).

This is shown by the fact that it did not break when cargo alone was on the pallet.

The fact that a pallet board breaks (and here the District Court was unable to make such a finding) does not establish that the board was defective and the vessel unseaworthy. In Jefferson v. Taiyo Katun, K. K., 310 F. 2d 582 (5 Cir. 1962), a dunnage board which broke as a longshoreman walked on it did not render the vessel unseaworthy. And in Logan v. Empresa Lines, 353 F.2d 373, 377 (1 Cir. 1965), the First Circuit affirmed the trial court's denial of recovery to a longshoreman who:

. . . did not produce any evidence which would compel the conclusion that the accident could only have occurred through a defect in the hatchboard . . .

Reed v. The Yaka, 183 F. Supp. 69 (E. D. Pa. 1960), relied on by Appellant to support his claim of unseaworthiness, is easily distinguishable. In that case there was no question but that the pallet board broke because of a defect in the wooden pallet as it was being used for staging. The use of the pallet as

staging was held to be proper. But in the case at bar there is neither a finding that the pallet board broke nor a finding that the board was being used in a proper manner.

It is well established in the Ninth Circuit that the warranty of seaworthiness does not extend to the negligent use by a longshoreman of a seaworthy appliance. Beeler v. Alaska Aggregate Corp., 336 F.2d 108 (9 Cir. 1964); Billeci v. United States, 298 F.2d 703 (9 Cir. 1962); Blassingill v. Waterman, 336 F.2d 367 (9 Cir. 1964). That the pallet was fit for its intended use was clearly brought out by Appellant's own testimony (T. 60):

Q. When you looked at this board, did you see anything wrong with it?

A. Looked good to me. Looked sufficient to me, because the cargo was on this pallet board, and the board looked good to me. Didn't look like no fault about it. I examined the board before I got on the board. Board looked good to me, because it had cargo on the board.

Appellant, therefore, must fail since the pallet board was found to be reasonably fit for its

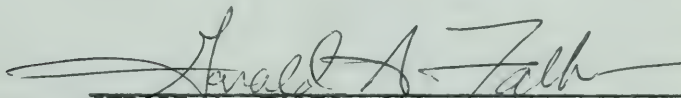
intended use and Appellant failed to convince the trial court of negligence by the United States.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

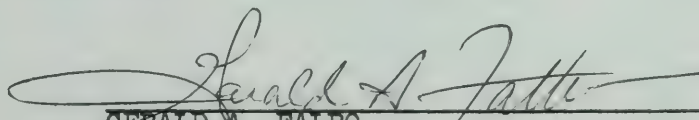
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CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19^{and 39} of the United States Court of Appeals for the Ninth Circuit, and in my opinion the foregoing brief is in full compliance with those rules.


GERALD A. FALBO
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NO. 21818

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER ADAMS,)
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 Appellant,)
)
 vs.)
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 UNITED STATES OF AMERICA and)
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 COMPANY,)
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APPELLANT'S REPLY BRIEF

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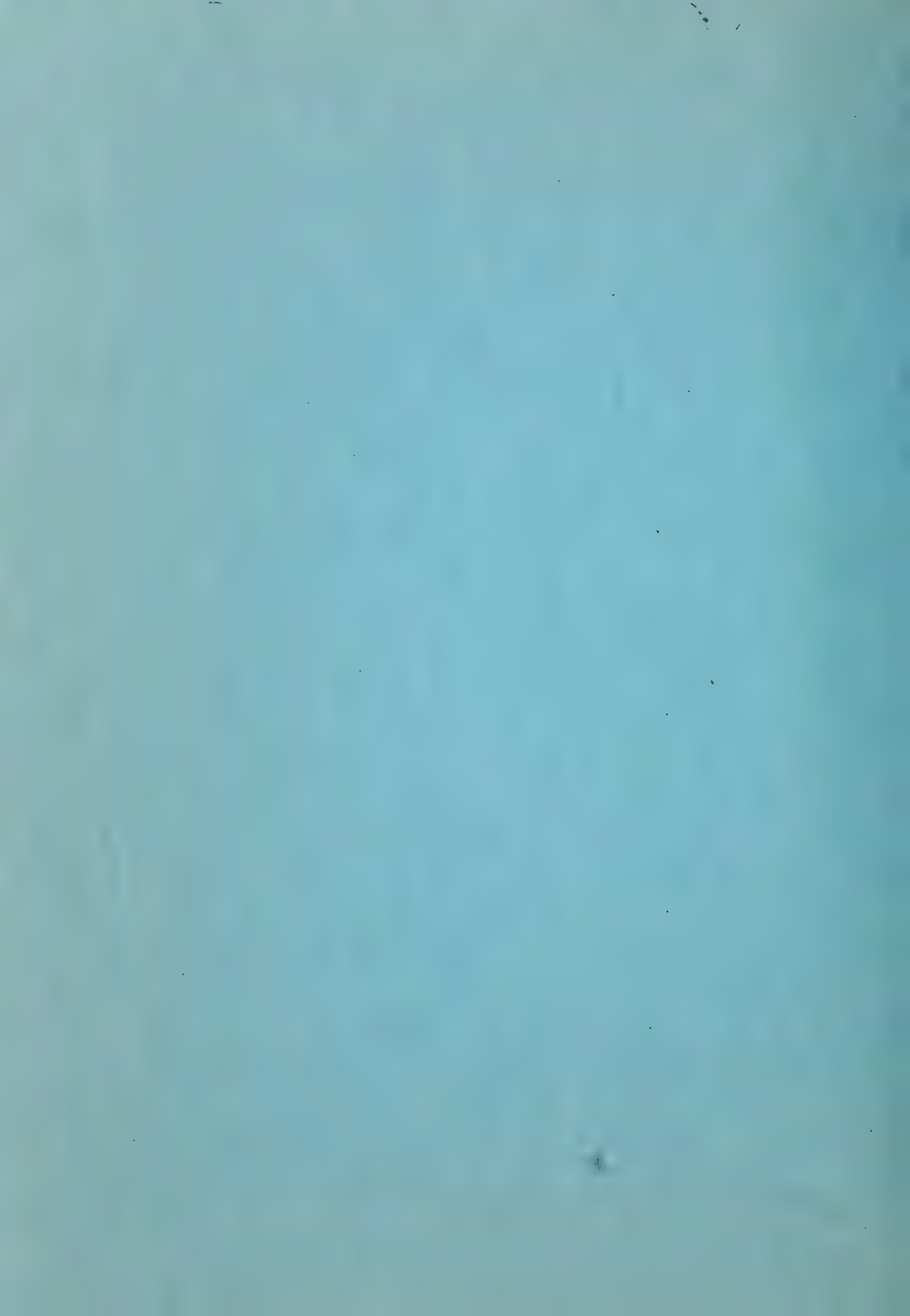
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WM. B. LUCK, CLERK

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NO. 21818

UNITED STATES COURT OF APPEALS
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vs.)
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UNITED STATES OF AMERICA and)
CALIFORNIA STEVEDORE & BALLAST)
COMPANY,)
)
<i>Appellee.</i>)
)
)

APPELLANT'S REPLY BRIEF

In this Reply, we have endeavored to reduce Appellees' argument to what we conceive its basic contentions to be, and then reply to them. At the outset, we do not think that Appellees have in any real measure joined issue with us, or reached the basic question before the Court.

I
THE TRIAL COURT FAILED TO DECIDE THE BASIC ISSUE
OF THE CASE: DID THE PALLET BOARD BREAK

A. *THERE WAS AMPLE EVIDENCE TO MAKE
SUCH A FINDING*

In its Brief, appellee asserts initially that, based on appellant's evidence, the Court below could not make a finding that the pallet board did in fact break. The appellant testified that the pallet board on which he stood, broke causing him to fall to the deck below. Herman Victor, a fellow longshoreman, observed the appellant lying on the deck and saw a pallet board suspended in the air on the forks of the lift truck; he noticed that the end of one of the boards of the pallet board was broken and he further observed a broken piece of wood on the deck near Adams (R.T. 15, 16).

Appellant submits that the foregoing evidence clearly shows that it was not a matter of appellant's failing to prove that the pallet board broke but rather the Court's failure to consider and pass upon this material issue.

Appellee suggests at the top of page 7 of its brief, that by failing to find that the injury occurred as alleged by Adams, the Court inferentially disbelieved him. What this means is difficult to determine. First, the Court stated unequivocally

that there was an accident (see Transcript of Record, page 147 lines 6, 13-15). Secondly, if the Court did not believe Adams it would have said so. Thirdly, it is doubtful that the Court would have indulged in such lengthy Findings of Fact concerning the "four on - four off" system and the dangers inherent in un-seated fork-lifts if it did not believe Adams.

Ironically, the alternatives were stated by the Court in the last sentence of the Fourth Finding of Fact but never passed upon:

"However, it is not necessary to determine if the pallet board broke or if Adams merely slipped to dispose of this case". (Transcript of Record, page 145 lines 15-17).

B. THE VESSEL WAS UNSEAWORTHY AS A RESULT OF OPERATIONAL NEGLIGENCE

For purposes of discussion, appellant will assume that the board did not break. Despite this fact the vessel was nevertheless unseaworthy under the facts presented as a result of the improper use of proper equipment by the longshoreman. *Blassingill vs. Waterman S.S. Corp*; (9 Cir. 1964) 336 F. 2d 367, 1964 A.M.C. 1932. The scheme of using a lift jitney with a pallet board on its forks as a means of conveying longshoremen from the deck to places above it, coupled with the failure to

provide ladders or steps, is operationally negligent. Such negligence amounts to unseaworthiness. *Grillea vs. United States* (2 Cir. 1956) 232 F. 2d 919, 1956 A.M.C. 1009. *Huff vs. Matson Navigation Co.* (9 Cir. 1964) 338 F. 2d 205, 1964 A.M.C. 2219.

Appellee's chief liability witness, K. B. GRAUNSTEDT, testified that the longshoremen loading the cargo work as directed (R.T. 189, lines 24-25; page 190, lines 1-13; page 194, lines 22-25). He further testified that the primary obligation and concern of the stevedore is to get the ship loaded properly and under way (R.T. 199, lines 21-25; page 200, line 1). As long as the men get to the top of the conax van to load the cargo, that's what counts (R.T. 200, 201).

The evidence is uncontradicted that the only means provided the longshoremen to get to the conax vans were pallet boards. As such there is nothing to hold on to should a longshoreman slip or should one of the boards break. The most obvious appliance to use under these circumstances is a ladder but none were furnished nor were they even mentioned as an alternative by K. B. GRAUNSTEDT.

A brief review of some of the more important cases adequately illustrates this basis of liability. In *Skibinski vs. Waterman S.S. Corp.* (2 Cir. 1966) 360 F. 2d 539, 1966 A.M.C. 873,

a welder-seaman was struck by a steel ladder which was being lowered into the hold of the vessel by means of the ship's winches. In order to lower the ladder through the hatch the longshoremen inserted an open mouth, "S" shaped cargo hook under the top rung of the ladder. When the foot of the ladder reached the floor of the hold, the ladder disengaged itself from the hook and rebounded against the plaintiff.

The Second Circuit found that the open mouth hook was unsuitable for the use to which it was put. "Improper use of otherwise sound equipment may give rise to a condition of unseaworthiness...Here, the longshoremen, by improperly using an open mouth hook, fashioned an apparatus which was patently unsuitable for the job to which it was put." *Skibinski vs. Waterman S.S. Corp.*, *supra*, 360 F. 2d 539, 542.

In *Reid vs. Quebec Paper Sales & Transportation Co.*, (2 Cir., 1965) 340 F. 2d 34, 1965 A.M.C. 112, a thirty five foot unsecured portable ladder was left unattended by a longshoreman. Subsequently, it fell injuring a fellow longshoreman. The Court, per Mr. Justice Thurgood Marshall, said at page 35:

"Under the circumstances it was necessary for the ladder to be secured in some fashion when it was being used, and unless it was so secured, it was unfit for its intended use. An unsecured, and dangling ladder under the conditions existing

at the time of the accident posed a serious threat to the safety of those standing below in the hold, regardless of whether the shipowner knew it was unsecured and regardless of how quickly this threat materialized."

and again at page 36:

"For here the ladder was not a suitable means of egress from the hold, under the existing circumstances, unless it was secured in some fashion, either by some mechanical device or by a workman holding it in place."

In *Thompson vs. Calmar S.S. Corp.* (3 Cir. 1964) 331 F. 2d 657, 1964 A.M.C. 2249, longshoremen moved freight cars on the pier by attaching bull winches to some of the freight cars and, utilizing the power of the ship's engines, bumped unloaded freight cars out of the way and loaded ones in place under the ship's booms. The "bumping" process occurred with such force that the plaintiff longshoreman was catapulted from one side of the "bumped" freight car to the opposite side causing serious injuries. In affirming the verdict, the Third Circuit Court stated at page 659.

"Further, the unseaworthiness of a vessel or its equipment may arise from acts of the longshoremen crew, or, indeed, of the injured longshoreman himself."

It is clear from the cases cited that a vessel can be rendered unseaworthy by the improper use of otherwise seaworthy equipment. Unfortunately, the Court never passed upon this issue either.

II

THE SAFETY REGULATIONS AND UNION AGREEMENT
UPON WHICH APPELLEE RELIES ARE IRRELEVANT

The bulk of appellee's brief is devoted to the discussion of the immorality of the "four on, four off" system and the evils attendant when a driver leaves the seat of his forklift with a load in the air. Appellee has not shown, however, the relevance of these alleged violations or how they proximately contributed to the accident in question.

Nor are the cases of *Logan vs. Empresa Lines*, 353 F. 2d 373, 1966 A.M.C. 92, and *Jefferson vs. Taiyo Kato*, K.K. 310 F. 2d 582 of aid to appellee. In the *Logan* case the jury, by special verdict, found that the hatch board fell because of unexplained reasons and not because it was too short or because it was dragged out of place by stevedoring operation. The *Jefferson* case was an appeal from an adverse *jury verdict*; no findings of fact or conclusions of law were made. In effect, the Fifth Circuit, in affirming, merely stated that it was not inconsistent to find that dunnage broke yet the vessel was not rendered unseaworthy.

For the foregoing reasons, it is respectfully requested that this case be reversed and a new trial ordered.

Dated: San Francisco, California, January 8, 1968.

Respectfully submitted,

DORSEY REDLAND
JOHN A. MCGUINN

15/ Dorsey Redland
Attorneys for Plaintiff and Appellant

CERTIFICATE OF CONFORMANCE

I certify that, in connection with the preparation
of this brief, I have examined Rules 18 and 19 of the United
States Court of Appeals for the Ninth Circuit, and in my
opinion the foregoing is in full compliance with those rules.

15/ John A. McGuinn
JOHN A. MCGUINN

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE L. SANFORD,

Appellant,

v.

UNITED STATES OF AMERICA and
UNITED STATES ARMY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF FOR APPELLEES

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21,819

GEORGE L. SANFORD,

Appellant,

v.

UNITED STATES OF AMERICA and
UNITED STATES ARMY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF FOR APPELLEES

JURISDICTIONAL STATEMENT

This action was brought by appellant in the United States District Court for the Eastern District of Washington seeking review of the decision of the Administrator of Veterans' Affairs denying disability benefits to appellant, and seeking review of the decision of the Army Board for Correction of Military Records denying changes requested by appellant in his records (1 R. 1-3,

7-8). The Government moved to dismiss the complaint on the basis of 38 U.S.C. 211(a) and 10 U.S.C. 1552 (1 R. 16-19, 30-32). ^{1/}
The district court granted the motion and dismissed the complaint (1 R. 61).

The jurisdiction of this Court rests upon 28 U.S.C. 1291.

STATUTES INVOLVED

10 U.S.C. 1552(a) and (b):

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice.
* * * Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

38 U.S.C. 211(a):

Except as provided in sections 775, 784, 1661, 1761, and as to matters arising under chapter 37 of this title, the decisions of the [Veterans] Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any

^{1/} The Government further noted that neither the United States Army nor the Veterans Administration are suable entities (1 R. 19).

court of the United States shall have power or jurisdiction to review any such decision. 2/

COUNTERSTATEMENT OF THE CASE

1. Appellant seeks review of determinations by the Army Board for Correction of Military Records and by the Administrator of Veterans Affairs (1 R. 2-3, 8) with respect to appellant's claim for service-connected disability benefits. The allegations of the complaint (as elaborated upon in briefs filed by appellant in the district court) may be summarized as follows: 3/

On December 14 and 15, 1942, while serving in the Army at Fort Douglas, Utah, appellant, together with other servicemen, suffered "acute-moderate" diarrhea. No hospitalization was afforded, and all were shipped out to further training at Camp Howze, Texas (1 R. 1, 36, 43, 45).

On July 4, 1943, while training at Camp Howze on an infiltration course under machine gun fire, appellant "froze" and was carried off the course (1 R. 1, 36, 47-49, 51). He was examined by medical personnel and sent back to his quarters (1 R. 49).

2/ None of the express exceptions to administrative finality contained in this Section are applicable here. Sections 775 and 784 relate to suits on insurance policies. Sections 1661 and 1761 permit audit and review by the General Accounting Office of payments made in connection with education and vocation programs. Chapter 37 relates to home, farm and business loans.

3/ Appellant's complaint in the instant action specifically incorporated his complaint in an earlier action (1 R. 7). That action (No. 2041, E.D. Wash.) was dismissed (1 R. 6).

Four months later, on November 19, 1943, appellant was transferred to another unit, with "some" other men not considered physically fit for combat (1 R. 1-2, 36, 47-49, 51, 55). At the new unit, on November 23, 1943, a psychiatrist interrogated appellant concerning the incident on the infiltration course and as to whether there had been any like incident in civilian life and, upon appellant's reply in the negative, stated, according to appellant, that for appellant's own good he would destroy the record, and did so (1 R. 1, 36, 47).

Appellant thereafter carried on his duties satisfactorily, including fully active overseas service from May 1944 to June 1945. Absence from duty on November 23, 1943, and February 1, 1944, was followed by return to duty on the same date on each occasion. 1 R. 54, 56-57. ^{4/}

In 1955 appellant filed a claim for service-connected disability with the Veterans Administration. In denying the claim, the VA noted appellant's allegations of an onset of nervousness while on the infiltration course, but concluded that there was no finding or treatment of nervous disorder during his military service (1 R. 2, 8, 36-37).

On March 27, 1965, appellant filed with the Army Board for Correction of Military Records an application for the correction of his military records to reflect that he had been transferred from Fort Douglas to Camp Howze in a "sick condition"

^{4/} Cf. a neighbor's letter ascribing appellant's "nervous breakdown" of the winter of 1949-1950, not only to war service but to the care of his ill mother and the burden of marriage and supporting two children (1 R. 60).

and that he had sustained a "paralysis injury" on the infiltration course at the latter installation (1 R. 7-8; and see 1 R. 17). On June 23, 1965, the Board determined that insufficient evidence had been presented to indicate probable material error or injustice (see 1 R. 20). The Board concluded, inter alia, that there was insufficient material evidence to support appellant's contention that he had suffered a "paralysis" on the infiltration course (1 R. 10).

2. The Government moved for dismissal of appellant's complaint on the basis that the complaint was in essence a claim for disability benefits which the Veterans Administrator has denied, and that 38 U.S.C. 211(a) categorically provides that "no other official or any court of the United States shall have power or jurisdiction to review any such decision" (1 R. 17). Additionally, it was urged that in light of appellant's long subsequent history of full duty, including combat duty overseas from May 1944 to June 1945, the Board was manifestly not arbitrary in refusing to change appellant's military records to attribute disabling consequences to the 1942 attack of diarrhea and the 1943 incident on the infiltration course (1 R. 30-32).

3. On February 24, 1967, upon written and oral arguments (3 R. 1-28), the district court granted the Government's motion to dismiss (1 R. 61). On March 23, 1967, appellant filed notice of appeal (1 R. 62).

ARGUMENT

THE DISTRICT COURT PROPERLY DISMISSED APPELLANT'S ACTION TO REVIEW DENIAL OF DISABILITY BENEFITS BY THE VETERANS ADMINISTRATOR AND TO REQUIRE THE ARMY BOARD TO CHANGE APPELLANT'S MILITARY RECORDS.

38 U.S.C. 211(a), supra, pp. 2-3, provides, with exceptions not here relevant, that the decisions of the Veterans Administrator "on any question of law or fact concerning a claim for [veterans] benefits or payments * * * shall be final and conclusive." The Section goes on to stipulate that no "court of the United States shall have power or jurisdiction to review any such decision." As this Court recently held in Redfield v. Driver, Administrator, 364 F. 2d 812, 813, this means precisely what it says: "There is no jurisdiction in the court below, or here, to review a final action of the [Veterans] Administrator."

Section 211(a) plainly is applicable here. In the final analysis, it is clear that appellant's objective is to upset the determination of the Veterans Administrator that he is not entitled to disability benefits based upon two isolated occurrences during his extensive (1942-1946) World War II military service; e.g., his brief bout with diarrhea at Fort Douglas in December 1942 and the equally brief "freezing" incident when he was under machine gun fire on the infiltration course at Camp Howze in July 1943.

Appellant's endeavor to obtain judicial review of the denial of disability benefits is not furthered by his focus upon the refusal of the Army Board for the Correction of Military Records to

act favorably upon his application to have changes made in his records which would support his service-connected disability claim. For one thing, appellant should not be permitted to obtain indirectly that which he is precluded by 38 U.S.C. 211(a) from obtaining directly; i.e., review of the Veterans' Administrator's denial of disability benefits under the guise of seeking review of the refusal of the Army Board to alter his military records. In any event, it is clear that the Board's action was fully justified. It is an indisputable fact that, following the two occurrences upon which appellant bases his claim of a service-connected disability, appellant not only completed his training period but then served overseas in a combat area from May 1944 to June 1945 (1 R. 56). During this service he was, according to his commanding officer, a soldier who "carried on all his duties in a very satisfactory manner" (1 R. 56). In these circumstances, it is scarcely surprising that the Army Board decided that the two transitory occurrences at an early stage of appellant's military career did not require an alteration in his military records "to correct an error or to remove an injustice." 10 U.S.C. 1552, supra, p. 2. Stated otherwise, the Board could certainly conclude that appellant's insistence that he had become disabled as a result of an alleged "acute illness" in 1942 and "paralysis injury" in 1943 was wholly refuted by the fact that -- for several years thereafter -- he fully discharged his military responsibilities without disabling physical or psychological impairment.

Since the Army Board's determination was -- at the very least -- not arbitrary, it is conclusive here. It is, of course,

not the function of the courts to review the weight of the evidence before the Board or to substitute its judgment for that of the Board with respect to whether the correction of a military record is warranted. See Stephens v. United States, 358 F. 2d 951, 954 (C. Cls.). ^{5/}

CONCLUSION

For the foregoing reasons, we submit that the judgment of the district court should be affirmed.

CARL EARDLEY,
Acting Assistant Attorney General

SMITHMOORE P. MYERS,
United States Attorney,

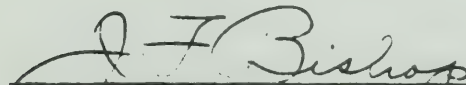
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July 1967

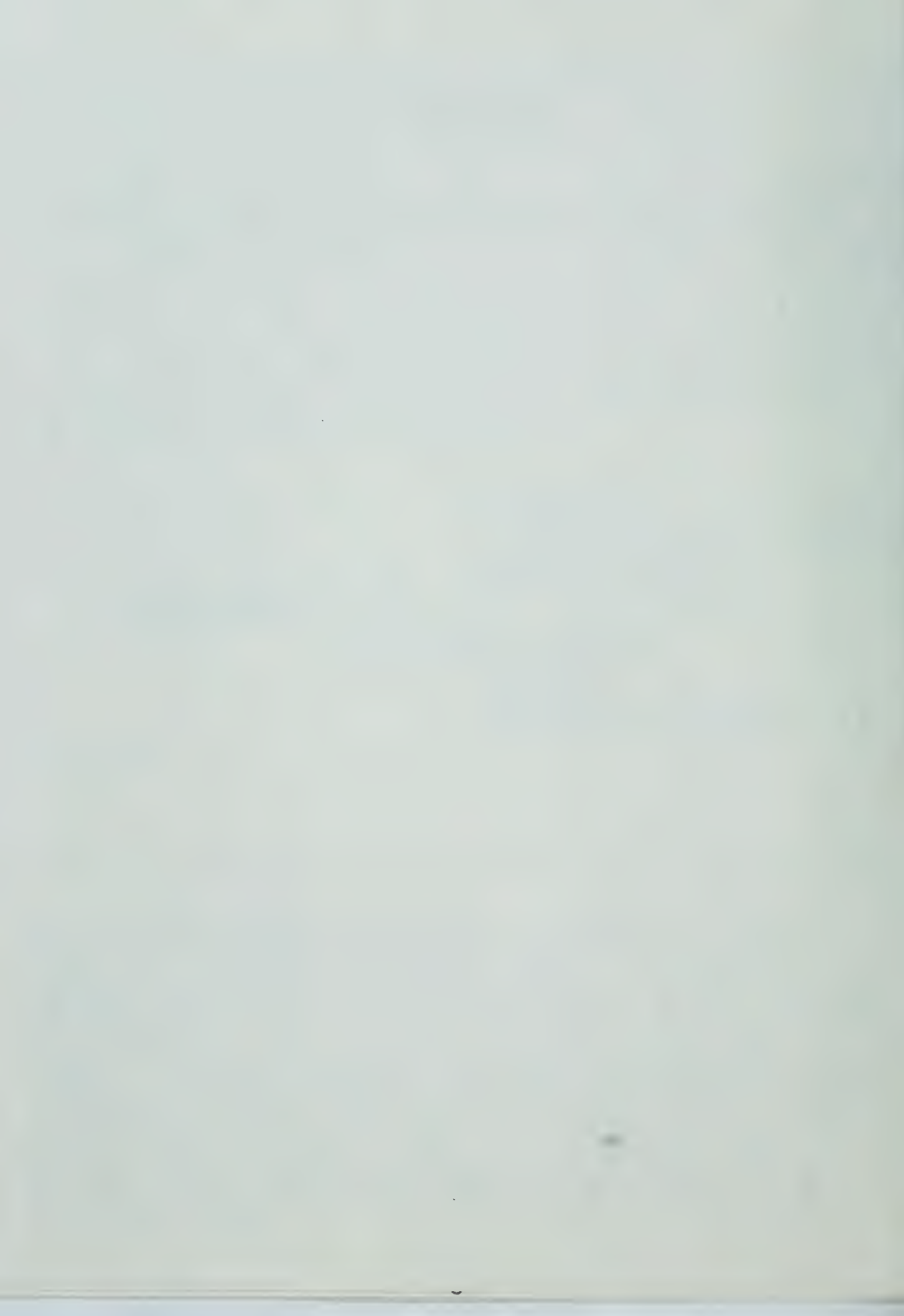
5/ Appellant's charge (Br. p. 18) that there was a "fraudulent * * * destruction and misuse" of his medical records by Army doctors is entirely without foundation. As previously indicated, appellant alleges that an Army psychiatrist destroyed (several months after the event) the record of the occurrence on the infiltration course. But even according to appellant, the doctor took the action only after he had apparently satisfied himself -- on the basis of his interrogation of appellant -- that this was an isolated incident of no prospective importance and that appellant would benefit from its deletion from his service record. Apart from the fact that the medical judgment of the psychiatrist was not proven wrong during appellant's subsequent military career, there is absolutely nothing to indicate that there was any other motivation for his action -- let alone a fraudulent purpose.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



J. F. BISHOP
Attorney.




AFFIDAVIT OF SERVICE

WASHINGTON }
DISTRICT OF COLUMBIA } ss.

J. F. Bishop, being duly sworn, deposes and says:

That on July 13, 1967, he caused three copies of the above brief to be served by the United States mails, in a franked envelope addressed as follows, to appellant, who is proceeding pro se:

Mr. George L. Sanford
424 South 35 Avenue
Yakima, Washington 98902


J. F. BISHOP
Attorney,
Department of Justice,
Washington, D. C. 20530.

Subscribed and sworn to before
me this 13th day of July, 1967.


NOTARY PUBLIC

My commission expires April 14, 1972.



CRIM. NO.

2 1 8 2 1 ✓

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRED PATRICK MEYERS,

Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Appellee.

Appeal from the United States District Court
For the Southern District of California
HON. JESSE W. CURTIS, Judge

APPELLANT'S OPENING BRIEF

FILED

OCT 13 1967

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OCT 19 1967

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7 FRED PATRICK MEYERS,

8 Defendant and Appellant,

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14 Appeal from the United States District Court
15 For the Southern District of California
16 HON. JESSE W. CURTIS, Judge

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18

APPELLANT'S OPENING BRIEF

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14 Appeal from the United States District Court
15 For the Southern District of California
16 Southern Division

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18

APPELLANT'S OPENING BRIEF

19

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21 JURISDICTION

22 This is an appeal from the judgment of the United
23 States District Court, for the Southern District of Califor-
24 nia, adjudging Appellant guilty of the violation of Title
25 21 U. S. Code, Sec. 174 in three counts of a five count
26 indictment following a trial by the Court without a jury.

1 The District Court had jurisdiction by virtue of
2 Title 21 Sec. 174 U.S.C.A. The jurisdiction of this Court
3 rests pursuant to Title 28 U.S.C., Secs. 1291 and 1294.
4

5 STATEMENT OF THE RECORD

6 On December 22, 1966 the appellant Fred Patrick
7 Meyers, together with Lois Ellen Blalock, were charged in an
8 indictment containing five counts. Appellant Meyers was
9 charged in Count One on September 22, 1966 with violation of
10 Sec. 21,174 (unlawfully receiving and concealing the trans-
11 portation of heroin), Count Two with violation of Sec. 21,174
12 (the sale of said heroin), Count Three on October 3, 1966,
13 together with co-defendant Blalock, with violation of Sec.
14 21,174 (selling a narcotic), Count Four on October 3, 1966
15 with violation of Sec. 21,174 (receiving and concealing the
16 same drug), and Count Five on October 15, 1966 with violation
17 of Sec. 21,176 (receiving and facilitating the transportation
18 of marijuana). (Cl. Tr. 1 to 6).

19 On January 5, 1967, the Court, being informed that
20 there is reasonable cause to believe that the defendant
21 and appellant was insane or otherwise mentally incompetent,
22 appointed Dr. Edwin McNeil, Dr. Frederick Wetzel and Dr.
23 Patrick J. Lovelle to examine defendant Meyers with specific
24 instructions to report to the Court concerning the sanity
25 of said defendant on the date of said examination and whether
26 the said defendant was presently under the influence of

1 narcotics and to render their report in writing to said Court
2 with copies thereof to defendant Meyers' counsel.

3 The defendant Meyers was thereupon committed to the
4 custody of the United States Marshal for the purpose of
5 conducting such examination (Cl. Tr. 7 to 10).

6 On January 31, 1967 a waiver of trial by jury and
7 special findings of fact were duly filed (Cl. Tr. p. 11).

8 On the same date defendant Meyers was arraigned and
9 entered a plea of not guilty (Cl. Tr. 12, 13). On February
10 8, 1967 the cause was called for trial before the Honorable
11 Jesse W. Curtis, District Judge.

12 At the close of the Government's case a motion for
13 judgment of acquittal was denied, which motion was renewed
14 at the close of the defendant Meyers' case and likewise
15 denied and again motion at the submission of the cause, and
16 denied. The defendant Meyers was found guilty on Counts
17 One, Two and Three, referred to the Probation Department
18 and continued to March 6, 1967.

19 On February 17, 1967 motion for new trial was filed
20 on behalf of defendant Meyers (Cl. Tr. p. 25) and on Feb-
21 ruary 20, 1967 the notice of motion was filed (Cl. Tr. 28).

22 On March 6, 1967 the cause was continued to March
23 20, 1967 (Cl. Tr. p. 30). On March 6, 1967 an information
24 charging a prior conviction was filed by the United States
25 Attorney (Cl. Tr. pp 31-32). The prior conviction charged
26 that on the 26th day of April, 1965 defendant Meyers was con-

1 victed of a violation of Title 26 Sec. 4724(a), the impor-
2 tation of narcotics without payment of taxes, and was
3 sentenced by the court for a period of three years, execu-
4 tion of the sentence being suspended and the defendant
5 placed on probation for a period of three years on certain
6 conditions, namely, that he not use barbiturates, marijuana
7 or narcotics in any form, nor associate with users, nor
8 approach the Mexican Border, nor enter Mexico, and to
9 submit to Naline tests as the Probation Departmenty may
10 require (Cl. Tr. pp. 31-32).

11 On March 20, 1967, the respective motions and
12 cause were continued to March 27, 1967, (Cl. Tr. p. 35),
13 thence to April 10, 1967 (Cl. Tr. p. 37) at which time the
14 defendant Meyers was sentenced to a period of ten years
15 each on Counts One, Two and Three of the Indictment to run
16 concurrently, the judgment and commitment providing that

17 "the Court recommends commitment to
18 a United States Public Health Hos-
19 pital facility where the defendant
20 can receive treatment for possible
21 narcotic addiction"(Cl. Tr. p. 38).

22
23 STATEMENT OF FACTS

24 Larry Brittenham,* a witness called on behalf of the
25

26 * This witness Brittenham will be referred hereafter as "B".

1 Government testified that on September 22, 1966 about 6:00
2 or 7:00 p.m. he made a 'phone call to Henry Freeman to pick
3 up an ounce of heroin. An objection as hearsay was made to
4 this testimony, which was overruled by the Court (Rp. Tr. p.
5 6). About 6:00 p.m. on that date another call was made to
6 Henry Freeman "to find out where to meet Fred Meyers for
7 the -- an ounce of heroin for three hundred --". A further
8 objection was made on the grounds of hearsay which was
9 denied by the Court (Rp. Tr. p. 7). About 6:00 p.m. on the
10 same date he made a 'phone call to defendant Fred Meyers
11 and met him at approximately 8:00 p.m. at the corner of
12 Balboa and Saticoy, together with Agent Westrate. Prior to
13 arriving at this location Agent Westrate searched the witness
14 and his automobile (Rp. Tr. p. 8).

15 About 8:00 p.m. defendant Meyers arrived with a
16 "girl" (Rp. Tr. p. 9). The agent and witness alighted from
17 their automobile and proceeded to the rear of the Meyers'
18 car. A conversation ensued at the rear of the Meyers'
19 vehicle. In the conversation Meyers stated the heat was on
20 pretty bad in Pacoima and when asked if he had any junk re-
21 plied "Yes, I have an ounce". The witness asked if he
22 (Meyers) was willing to bring the narcotic to them but he
23 (Meyers) said he wouldn't do it that way, that he had it
24 "stashed a couple of blocks from here" (Rp. Tr. p. 10).
25 He would take the witness to a location but would not permit
26 the agent to go along as he trusted nobody. The witness



1 then entered into Meyers' car (Rp. Tr. p. 11) and they pro-
2 ceeded in a circuitous route and at different signals the
3 defendant would catch a signal before it turned red so that
4 any other car that might be following them could not come
5 on through (Rp. Tr. p. 12). Arriving at Napa Street Meyers
6 and the witness alighted from the car and proceeded across
7 the street into an open field and there Meyers leaned over,
8 picked up a prophylactic and placed it back (Rp. Tr. p. 13).
9 Meyers instructed the witness not to bring any other person
10 with him if he desired any more narcotics (Rp. Tr. p. 14).

11 On the return to Balboa and Saticoy Westrate counted
12 out some money (Rp. Tr. 15). Thereupon the witness and
13 Westrate proceeded to Napa Street and the agent picked up the
14 prophylactic and returned it to the automobile (Rp. Tr. p. 15).
15 The witness and his automobile were again searched and they
16 proceeded to the Federal Building where the witness "turned in
17 a statement" (Rp. Tr. pp. 16-17).

18 On October 3, 1966 at about 6:00 p.m. the witness
19 made a telephone call from a 'phone booth monitored by Agent
20 Westrate to defendant Meyers (Rp. Tr. p. 17). In the conver-
21 sation the defendant instructed the witness to meet him at
22 Laurel Canyon and Van Nuys Boulevard, that he would give him
23 forty grams for five hundred. Agent Westrate was again
24 present at this transaction (Rp. Tr. p. 18). Agent Westrate
25 searched the witness before proceeding to the location.
26 After a second 'phone call to the defendant he arrived at the

1 location and instructed the witness to follow him in his car
2 without Agent Westrate. The witness followed for a dis-
3 tance of a few blocks, both cars came to a stop at a dead-
4 end street and both persons alighted from the automobiles
5 and proceeded across the street to a tan colored automobile
6 parked in the rear, which was occupied by the same girl
7 who was in the Meyers' car in the first transaction. The
8 witness gave the defendant Meyers the money which in turn
9 was given to the girl and she delivered 40 grams contained
10 in a prophylactic to the witness (Rp. Tr. p. 21). The
11 witness thereupon returned to his car and drove to the place
12 where Agent Westrate was parked and the narcotic was then
13 picked up from the seat of the car (Rp. Tr. p. 22) by the
14 Agent.

15 On cross-examination the witness testified that he
16 had been convicted of a felony in the Superior Court of Los
17 Angeles County; he denied the use of heroin but admitted
18 he used a narcotic for five or six years (Rp. Tr. p.25).
19 He knew Meyers for about two years and met the Agents in
20 April of '66. At the time that he met the Agent he was in
21 possession of the narcotic, marijuana (Rp. Tr. p. 27).
22 He stated that a complaint had been filed against him but he
23 never had been taken to court or prosecuted for the charge
24 (Rp. Tr. p. 28). The witness was then asked if he had ever
25 testified in court in connection with any matters involving
26 narcotics, to which he replied "Yes, I have". When asked

1 in what cases or the names of the defendants, the Court
2 interrupted and interposed its own objection on the grounds
3 that the defendant was not entitled to know what cases and
4 refused to permit counsel to elicit the cases in which the
5 witness had testified (Rp. Tr. p. 29). Defense Counsel
6 insisted that the purpose of eliciting the testimony from
7 the witness was to establish his bias and prejudice and the
8 refusal to permit such examination was in effect, a denial
9 of the right of cross-examination. The witness denied that
10 he had been promised anything in connection with his case by
11 any Federal officer (Rp. Tr. p. 32).

12 The witness further testified that he had known Henry
13 Freeman for approximately eight years and identified Freeman
14 as being in the courtroom at the moment. The witness de-
15 nied that he had told Mr. Freeman that he would like to
16 plant some narcotics in Meyers' home. He denied telling
17 Mr. Freeman that he was an addict of narcotics although he
18 admitted that at the time of his transaction with Westrate
19 he was under the influence of marijuana (Rp. Tr. pp. 34-35).
20 He first met Mr. Westrate in June or July of 1966 (Rp. Tr.
21 p. 37). At the time he made the telephone call to defendant
22 Meyers he (the Agent) monitored the telephone call. The
23 defense counsel thereupon moved the court to strike this
24 testimony on the grounds that it was in violation of the
25 Fifth Amendment and the Federal Communications Act, which
26 motion was denied by the Court (Rp. Tr. p. 38).



1 The witness continued to reiterate the story of the
2 transactions on cross-examination, adding that the five
3 hundred he delivered to the defendant he had received from
4 Agent Westrate (Rp. Tr. p. 42). The witness denied receiving
5 any money from Federal agents for expenses or otherwise (Rp.
6 Tr. p. 46). The witness admitted writing and signing a
7 statement for the officers during the transaction (Rp. Tr.
8 p. 47). This statement was shown to defense counsel. The
9 witness denied using heroin or having used heroin with a
10 Henry Freeman (Rp. Tr. p. 48). He denied using pills, his
11 last use of them was in June of 1966. After some considera-
12 ble cross-examination the witness admitted that he had a
13 conversation with narcotic Agent Westrate about calling
14 Meyers and attempting to make a buy (Rp. Tr. p. 55).

15 David Lawrence Westrate called as a witness on be-
16 half of the Government testified that he was a Federal
17 Narcotic Agent and he had been employed as such for the past
18 two and one-half years.

19 At the inception of the witness' testimony the
20 Government moved to dismiss Count Five, which motion was
21 granted. Agent Westrate testified at approximately 6:00 or
22 7:00 p.m. a telephone call was made on September 22, 1966
23 from the office of the Narcotic Bureau in the Federal Build-
24 ing by Mr. B to a Henry Freeman. This conversation was moni-
25 tored by the officer. After the call B was searched for
26 money or narcotics and none found. They then proceeded to

1 the foregoing lot and B's vehicle were searched for money and
2 narcotics; at about 8:00 p.m. the witness was seated in the
3 vehicle of B's at the intersection of Balboa and Saticoy
4 Streets. Defendant Meyers arrived in a '58 Chevrolet.
5 B, the witness, and defendant Meyers met at the rear of
6 Meyers' vehicle. A discussion ensued concerning narcotic traf-
7 fic in the area. An objection was interposed by defense
8 counsel on the grounds that the defendant had not been advised
9 of his constitutional rights or that the witness was a
10 narcotic agent. This objection was overruled. The witness
11 and B told defendant Meyers that they were selling heroin in
12 small amounts and the narcotics they were going to purchase
13 from Meyers they would break up and sell to several people.
14 A further conversation took place about the delivery of the
15 heroin, the witness asked the defendant if he had the heroin
16 with him and he replied that he did not, that it was stashed
17 a few blocks away. When requested to bring the heroin the
18 defendant replied that he wouldn't do that as he did not know
19 the witness, he was leary of him, and wouldn't do it that
20 way (Rp. Tr. p. 60). Meyers said that B could go with him
21 and he would show B where the narcotics were hidden and that
22 he would return for the money. B and Meyers then departed
23 in Meyers' car. Subsequently they returned. The court
24 overruled the defense objection to the conversation between
25 the officer and the defendant on the ground that defendant
26 had not been advised of his constitutional rights (Rp. Tr. 62).

1 After counting out the money the agent "flipped" the three
2 hundred dollars into the back seat of the Meyers' automobile,
3 Meyers refusing to accept the money in his hand (Rp. Tr. p.
4 63).

5 The officer then conducted a field test for heroin
6 and received a positive reaction (Rp. Tr. p. 64). He there-
7 upon searched the witness B and his automobile for any money
8 or narcotics (Rp. Tr. p. 64).

9 After the meeting and the passing of the money B and
10 the officer proceeded in B's car to Napa and Forbes Streets,
11 alighted from the automobile and B pointed out a rubber con-
12 traceptive next to the sidewalk (Rp. Tr. p. 65). The
13 officer identified the contraceptive as Exhibit 1 (Rp. Tr. p.
14 66).

15 On October 3, 1966, the Agent met with B at his home;
16 had a conversation and departed with B (Rp. Tr. pp. 68-69).
17 B made a telephone call to defendant Meyers which was monitor-
18 ed by the Agent (Rp. Tr. p. 69). B told defendant he had
19 five hundred and wanted to buy two ounces of heroin. They
20 agreed to meet at the intersection of Laurel Canyon and Van
21 Nuys Boulevard and B was to call the defendant from that
22 location (Rp. Tr. p. 70). The call was made and Meyers told
23 B in a monitored conversation that he would not sell heroin
24 if the witness was around. Subsequently defendant arrived
25 (Rp. Tr. p. 71). The witness gave B five hundred in Govern-
26 ment funds, the defendant told B to follow him. The witness

1 did not see the defendant Meyers "again that day", but did
2 see B (Rp. Tr. p. 72) when he returned. The witness entered
3 B's car and on the front seat there was a contraceptive with
4 white powder in it which the witness identified as Exhibit 2
5 (Rp. Tr. p. 73). B and his vehicle were again searched
6 by the officers who found no money or narcotics. Both
7 Exhibits 1 and 2 are identified as containing heroin (Rp. Tr.
8 p. 74).

9 On cross-examination the witness testified that he
10 first met B in April of 1966. The witness then testified
11 that he purchased marijuana from the witness B in April of
12 1966 and a month or two later filed a complaint with the
13 United States Attorney's office and the Commissioner (Rp. Tr.
14 p. 75) which had never been brought to a final disposition
15 nor presented to the Federal Grand Jury (Rp. Tr. p. 76).
16 The agent advised B that his cooperation with the Bureau
17 would be made known to the United States Attorney's office
18 for whatever action they deemed necessary and was released
19 on O.R. B has been used in other matters which have
20 resulted in prosecution involving narcotics (Rp. Tr. p. 77).
21 The officer had been advised that B had purchased heroin,
22 pills and marijuana (Rp. Tr. p. 78). When the case was
23 first called for trial the officer admitted that he observed
24 the defendant Meyers and was of the opinion that he was under
25 the influence of a drug (Rp. Tr. p. 82).

26 The Government offered the exhibits in evidence which

1 was objected to for lack of foundation that the defendant
2 was not advised of his constitutional rights. The Govern-
3 ment rested.

4 The defendant moved for a judgment of acquittal on
5 the ground that no proof was brought to show that the pro-
6 duct was imported or that in truth and in fact "that the pro-
7 duct was imported". (Rp. Tr. p. 87)

8
9 DEFENSE

10 At the onset of the presentation of the defense the
11 Government and defendant's counsel stipulated to the testi-
12 mony of Dr. Patrick J. Lavelle who conducted a physical,
13 clinical and chemical test of the defendant on January 5,
14 1966, under Order of the Court, which is summarized as
15 follows:

16 "The lower extremities are normal, the upper
17 extremities show extensive tracks on the
18 bends of both elbows and both forearms. As
19 a matter of fact, both sides show approximate-
20 ly the same picture. There are on each arm
21 two 4" tracks and superimposed on these two
22 4" tracks on each arm are over 20 fresh
23 puncture wounds. Each of these shows various
24 stages of age up to two weeks' time. In
25 other words, there were at least 40 fresh
26 puncture wounds, all estimated to be less



1 than two weeks old and these were superimposed
2 over two 4" trackson the right arm and two 4"
3 tracks on the left arm.

4 Conclusion: It is this examiner's opinion
5 that the patient, at the time of this exami-
6 nation, is an actual narcotic addict and he
7 is in the mild and early stages of narcotic
8 withdrawal. The above conclusion is based
9 on the history the patient gives of using
10 narcotics; the findings of nervousness and
11 the rapid pulse; the dilated pupils which fail
12 to re-act to light; the increased secretions
13 of the nose and the eyes; and the extensive
14 old tracks and 40-plus fresh puncture wounds,
15 all less than two weeks old, superimposed on
16 the tracks of right and left arms. He is under
17 the influence of narcotics at this time.

18 Respectfully submitted,

19 Patrick J. Lavelle, M.D."

20 (Rp. Tr. p. 92, ls. 14 through 13 on p. 93).

21
22 In a supplemental report of laboratory studies,
23 dated January 11, 1967, the doctor reports:

24 "In re: Fred Meyers - Case No. 34CD

25 Superseding Indictment 130CD

26 Following is a supplemental report to that

1 submitted on January 5, 1967:

2 Urinalysis for opiate alkaloids has come
3 back 64.4 mg%. A word of interpretation
4 about this figure:

5 1. It is a high to very high level of
6 opiate alkaloids in the urine.

7 2. It substantiates the findings on
8 clinical examination that the patient was
9 under the influence of narcotics at the time
10 of the examination.

11 Again hoping that this information will
12 prove valuable to the Court and to the
13 patient, I remain --" (Rp. Tr. p. 94,
14 ls. 1 through 16).

15
16 The defendant Fred Patrick Meyers was called as a
17 witness in his own behalf and testified that at the time of
18 the commission of the two sales charged in the Indictment,
19 he was using heroin and had been using it for about two years
20 prior thereto; that he was injecting himself about three or
21 four times a day (Rp. Tr. p. 95) and unable to resist the use
22 of the drug or the request of persons to violate the law;
23 that he made an honest effort to get rid of the habit by
24 consulting doctors and psychiatrists (Rp. Tr. pp. 90-97).
25 He had marks on his arms, demonstrating his use of heroin.

26 The Court thereupon observed and defendant's counsel

1 replied:

2 "THE COURT: Is the prolongation of this in-
3 quiry necessary where there is no doubt but
4 what this defendant is an addict?

5 MR. PARSONS: I don't think so, your Honor.

6 THE COURT: We know how he takes it. The
7 only thing we are concerned with here is
8 whether his addiction is of such a nature as
9 makes it impossible for him to resist the
10 opportunity to sell, as near as I can see.
11 Any inquiry along that line would be helpful.
12 I would think that would be worth a lot.

13 MR. PARSONS: Yes.

14 Q Mr. Meyers, you are charged here with
15 selling heroin. There has been some evidence
16 offered here to that effect that people have
17 made certain requests upon you to sell heroin.
18 Have you been able to yourself resist those
19 solicitations that you violate the law and
20 make such sales?

21 A I don't understand that.

22 MR. PARSONS: May I have that read to him,
23 please?

24 (Question read.)

25 THE WITNESS: No."

26 (Rp. Tr. p. 98, ls. 2 through 23).

1 On cross-examination the defendant testified that
2 he had been previously convicted of grand theft, burglary
3 and failure to pay tax on heroin and that he knew that
4 heroin "has come from Mexico", - that he had made an honest
5 effort to clean himself of his habit but had never submitted
6 himself to a hospital for treatment for narcotic addiction.
7 The following interrogation is of significance:

8 "Q What have you done to make an honest
9 effort to clean yourself as an addict?

10 A I have left the County on several
11 occasions to go up and try cleaning up for
12 periods of time, four days, five days.

13 Q By yourself?

14 A Yes; by myself.

15 Q Where would you go on these occasions?

16 A One time I went up to Santa Cruz. I
17 stayed with my brother up there. I went to Indio
18 one time and stayed down there. And I stayed
19 in Bakersfield one time.

20 Q Did you ever go to a doctor --

21 A I wanted --

22 Q To help you through these periods?

23 A I wanted to. I consulted a doctor and
24 he said it was against the law for a doctor to
25 treat an addict.

26 Q Did you ever try and submit yourself to

1 some private foundations like Synnon or other
2 foundations like that to cure your habit?

3 A No, I haven't.

4 Q Could you state the reason for this, why
5 you haven't?

6 A Well, everybody I know that has come out
7 of the hospital, they're out for short periods
8 of time and they're using again, so I didn't
9 feel that it would do me any good either.

10 Q Did you know why they started using again?

11 A No, I didn't.

12 Q Didn't you think, though, Mr. Meyers,
13 that if you really wanted to clean yourself of
14 this habit that the proper way to do it would
15 have been with medical help?

16 A I tried to get medical help from two
17 different doctors.

18 Q Private doctors of your own choosing?

19 A Yes.

20 Q Did these doctors suggest that you seek
21 help in a hospital for narcotics addiction?

22 A One says the best thing to do is just
23 kick it cold turkey, and I tried that.

24 Q You live in California; is that correct?

25 A Yes, I do.

26 Q Do you know of the provision in California

1 "law that allows an addict to commit himself
2 voluntarily for treatment --

3 A No, I don't.

4 Q -- without criminal sanction?

5 A No, I don't."

6 (Rp. Tr. pp. 101, line 3 through line 25 p. 102).
7

8 Over continued objection that the interrogation was
9 not within the scope of the direct examination, the witness
10 testified that he made no sales on September 22nd and
11 October 3rd to the narcotic officer. However, he admitted
12 finding some \$300 on the back seat on the first occasion
13 (Rp. Tr. pp. 106-109).

14 Leonard Lawrence Meyers testified that he is the
15 brother of Fred Meyers, who is 25 years of age; that he saw
16 the defendant frequently during the past several years (Rp.
17 Tr. p. 110). In describing the defendant's attitude during
18 the past two years he noticed a complete change in person-
19 ality. Where previously he had a likeable personality,
20 easy to get along with, he would now argue, forget things,
21 cuss for no reason at all, and get mad and not talk for
22 days at a time. His general appearance has changed, he
23 was now a lot "skinnier", his face broken out with pimples;
24 his ideas are dead wrong, makes statements about breaking
25 in and stealing to get himself a Color TV or tires and
26 the witness believes that the defendant was unable to dis-

1 tinguish between right and wrong (Rp. Tr. pp. 113-114).

2 On cross-examination the witness testified as to
3 the defendant's further contact with his family.

4 Leonard Meyers called as a witness on behalf of the
5 defendant testified that he is the father of the defendant;
6 that he noticed the defendant's conduct in the past couple
7 of years as compared to his prior conduct (Rp. Tr. pp. 115-
8 116). He noticed a change in the defendant's temperament,
9 that everything seemed to go wrong with him, he would get
10 real hot-headed, mad and angry if anyone tried to tell him
11 something; the people he "chummed" with were altogether
12 different, he became skinny and he was of the opinion that
13 he was not able to resist requests upon him to violate the
14 law. The father stated he was going to have him admitted
15 to a hospital if he didn't change; that the defendant was
16 unable to distinguish between right and wrong (Rp. Tr. p.117)

17 Tess Meyers called as a witness on behalf of the
18 defendant testified that the defendant is her son; that she
19 noticed a change, a marked change, in his conduct and ac-
20 tions during the past two years, that all of a sudden he
21 changed, accusing his mother of doing things against him and
22 picking up things that belonged to him; his personality
23 changed entirely; that after observing him, his conduct
24 and his conversation and treatment of other members of his
25 family that it was her opinion he was not competent to re-
26 sist any request by persons to violate the law or that he

1 was unable to distinguish between right and wrong (Rp. Tr.
2 p. 124). She further testified that she was a nurse, had
3 been employed in the State Hospital in Wisconsin and the
4 Sepulveda Veterans Administration Hospital and had worked
5 for six years in a psychiatric hospital (Rp. Tr. p. 126).
6 She observed her son in a depressed condition and if he
7 hadn't been watched carefully would have committed suicide
8 because he said that he wanted to die and did not want to
9 live (Rp. Tr. p. 126).

10 Henry Clark Freeman testified on behalf of the
11 defendant. He said he knew the witness B for approximately
12 eight years. During the summer of 1966 he had a conversa-
13 tion with B. He told him he "would like to plant some
14 stuff in Mr. Fred Meyers' home". That he had used heroin,
15 marijuana and barbiturates with B. The witness testified
16 that he had not made arrangements on October 16th or 17th
17 to supply Agent Westrate or Mr. B with heroin and on
18 October 17, 1966, did not receive \$300 from Agent Westrate.
19 On an occasion Agent Westrate and B came to his home wanting
20 to score some heroin but the witness told them that he could
21 not get any.

22 The Defense rested.

23 The defendant hereupon made a motion for judgment of
24 acquittal.

25 Dr. Edwin E. McNeil called as a witness on behalf
26 of the Government testified that he specialized in neurology

1 and psychiatry (Rp. Tr. p. 133). On January 5, 1967, he exami-
2 ned the defendant under appointment by the Court and listened
3 to the witness in the courtroom during the trial (Rp. Tr. p.
4 137). It was the doctor's opinion that the defendant was
5 "not presently suffering from a psychosis", was able to
6 understand the proceedings against him and to assist in his
7 own defense; that in his opinion on September 22, 1966 and
8 October 3, 1966 the defendant was not suffering from any
9 mental defect or disorder rendering him incapable of distin-
10 guishing between right and wrong; that he was capable of
11 knowing the nature and quality of his acts; that his will
12 was not destroyed at the time of the commission of the offens-
13 es and that he was capable of controlling his actions in
14 question (Rp. Tr. 137 and 138); that he had the ability to re-
15 frain from committing the acts with which he was charged (Rp.
16 Tr. p. 139).

17 On cross-examination the doctor testified that at
18 the time of the examination of January 5, 1967 the defendant
19 had quite a few marks on his arms, as many as 40 (Rp. Tr. p.
20 139); that the marks indicated injections of heroin and that
21 the defendant at that time was under the influence of narco-
22 tics and showed evidence of withdrawal symptoms. The defend-
23 ant stated to the doctor in the course of the examination
24 that he had used heroin "quite a bit" and that the defendant's
25 statement that he was hooked on heroin seemed consistent with
26 what he had observed (Rp. Tr. p. 141). At the time of the

1 examination the defendant told the doctor that he was suf-
2 fering with a severe headache. The doctor observed that he
3 was perspiring more than normal and that the defendant
4 looked ill to him (Rp. Tr. p. 142); he was restless, com-
5 plained of marked stomach craps. The doctor observed an
6 excessive amount of mucus in his nose and needle marks over
7 the veins in both forearms and many older needle marks. The
8 defendant stated to the doctor he had "fixed" that morning
9 and he was having withdrawal symptoms and needed another
10 "fix". The doctor formed the opinion that he probably was
11 an addict (Rp. Tr. p. 143).

12 The motion for judgment of acquittal was predicated
13 upon the fact that the defendant was so afflicted by the
14 continued use over a long period of time with the narcotic
15 drug heroin that he was unable to determine right from wrong;
16 that using "legal terminology he is insane". (Rp. Tr. p.
17 146)

18 Defense counsel then made the following statement:

19 "... I was going to ask your Honor if you
20 wouldn't withhold the judgment in this case and
21 let us commit this man. He will voluntarily
22 submit to commission to an institution.

23 Now, there is a new law which we discussed
24 here. You gave us time and I have spent some
25 time looking into this. I know Mr. Nasatir
26 has also. There is an act we thought would

1 help him, but there is a provision in there
2 that if he has been convicted before he can't
3 be helped. But that act is not available only
4 for the lack of funds to endorse it. He has
5 got this prior, which he frankly admits, on
6 a tax count. I don't think that would bar
7 him. Maybe it would, but I don't think it would.

8 But in any event, I think this man could
9 be committed to a Government hospital by this
10 Court upon his application.

11 I would, as a practical matter, like to
12 have your Honor take this under submission
13 until we can work this out". (Rp. Tr. p. 147,
14 ls. 1 through 19).

15
16 The Court thereupon made the following observation:

17 "THE COURT: Well, this, of course, is one
18 of those pathetic cases of a defendant who is a
19 pathetic figure and who does need help. Obvious-
20 ly he is an addict. Obviously his will to re-
21 sist the use of narcotics is gone, at least
22 for the time being.

23 But he is charged with sale, and I can't
24 overlook the fact that so far as his will is
25 concerned with respect to the sale it is quite
26 a different thing.

1 "This isn't the type of irresistible impulse
2 that we are talking about when we say a man's
3 will is so destroyed that he does not have the
4 capacity to resist these impulses. I am sorry
5 for the defendant.

6 I think there is within the Federal struc-
7 ture a hospital which can take him and receive
8 him and give him some help. And at the appro-
9 priate time it is my intention to recommend to
10 the Bureau of Prisons that he be placed in a
11 hospital immediately for medical care because
12 he needs it.

13 But that does not do away with the fact
14 that this defendant has been guilty of this
15 offense, a fact which I cannot overlook.

16 The Court, therefore, finds the defendant
17 guilty on Counts 1, 2 and 3 of the Charge.
18 The matter will be referred to the Probation Officer
19 for a presentence report". (Rp.Tr. p. 150, ls.
20 8 through 7 on p. 151).

21 The Court thereupon made the further observation after
22 committing the defendant:

23 "This fellow is a danger to himself at this moment.
24 I think he should be remanded to the custody of
25 the Marshal immediately. The time he served from
26 now on will be credited to his final sentence. I

1 think for his own best interest, as well as
2 society's, he had better be incarcerated im-
3 mediately.

4 MR. PARSONS: Very well.

5 THE COURT: His bond will be exonerated.

6 Court stands adjourned". (Rp. Tr. p. 152,
7 1s. 7-14).
8

9 On April 10th a hearing was conducted at which a
10 certified copy of the judgment and probation order in Case
11 No. 34477, which disclosed that on April 26, 1965 Fred Pat-
12 rick Meyers was convicted and sentenced in San Diego, Califor-
13 nia, for violation of Title 26 United States Code, Sec.
14 2476(a) (Rp. Tr. p. 157)

15 Evidence later disclosed that the record of convic-
16 tion pertained to the defendant. The Court found that the
17 alleged prior for violation of Title 26, Sec. 4724(a) was
18 true (Rp. Tr. p. 171).

19 After sentence was imposed on the defendant a motion
20 was made to set bail on appeal. The Court thereupon observ-
21 ed the following:

22 "THE COURT: I don't think it would be
23 fair to this defendant to subject him to the
24 possibility of failure. And I am afraid he
25 would fail. He is a sick boy. I think he
26 is going to need some help and some forceful

1 help.

2 I don't know that he can yet be aware of the
3 seriousness of his problem. If he is, I don't
4 think he has the capacity to resist it.

5 No, the motion will be denied". (Rp. Tr. p.
6 192, ls. 6-13).

7 The record clearly demonstrates, without doubt,
8 the defendant and appellant's use of, and addiction to,
9 narcotics. The declared policy of the Congress was surely
10 adopted to meet such problems as quite forceably exist in
11 the instant matter. Any other interpretation would negate
12 the purposes and intent of the law.

13
14 THE TRIAL COURT ERRED IN FAILING TO
15 FOLLOW THE DECLARED CONGRESSIONAL
16 POLICY AND THE PROCEDURE PROSCRIBED
IN POST NARCOTIC CONVICTIONS

17 The Narcotic Rehabilitation Act of 1966 enunciates
18 a clear Declaration of Policy:

19 "Sec. 2 - It is the policy of the Con-
20 gress that certain persons charged with or
21 convicted of violating Federal criminal
22 laws, who are determined to be addicted
23 to narcotic drugs, and likely to be re-
24 habilitated through treatment, should,
25 in lieu of prosecution or sentencing be
26 civilly committed for confinement and

1 treatment designed to effect their restora-
2 tion to health, and return to society as
3 useful members.

4 It is the further policy of the Congress
5 that certain persons addicted to narcotic
6 drugs who are not charged with the commis-
7 sion of any offense should be afforded the
8 opportunity, through civil commitment, for
9 treatment in order that they may be rehabilit-
10 ated and returned to society as useful members
11 and in order that society may be protected
12 more effectively from crime and delinquency
13 which result from narcotic addiction".

14 (P.L. 89-792 - 5672).
15

16 It is without dispute in this record that defendant
17 had for a period of approximately some two years prior, and
18 at the time of the trial was, a confirmed narcotic addict.
19 The trial court recognized and confirmed his affliction on
20 several occasions during the course of the trial and at the
21 time of the imposition of the sentence.

22 At the outset of this discussion it is well to note
23 that the court clearly indicated that it was cognizant of
24 the defendant's disease of narcotic addiction when he stated:

25 "He is a sick boy. I think he is going
26 to need some help and some forceful help. I

1 don't know that he can yet be aware of the
2 seriousness of his problem. If he is, I don't
3 think he has the capacity to resist it". (Rp.
4 Tr. p. 192).

5
6 The judgment and commitment imposed sentence of ten
7 years on each of the three counts to run concurrent, with
8 the further provision that "The Court recommends commit-
9 ment to a United States Public Health Hospital facility
10 where the defendant can receive treatment for possible nar-
11 cotic addiction". (Cl. Tr. p. 38).

12 It clearly appears from the record that it was the
13 intention of the Court that the defendant receive treatment
14 for his narcotic addiction problem. The problem that
15 presented to this court is whether the procedure provided in
16 the Narcotic Addict Rehabilitation Act of 1966 was exercised
17 or followed in the instant proceedings. The Act provides
18 an alternative to civil commitment in these cases where an
19 addict was not civilly committed prior to trial and convic-
20 tion. The legislative history further enunciates that
21 "treatment is available to addicts who do not choose civil
22 commitments or were not chosen for it by the Court".
23 U. S. Congressional and Administratives News, 89th Congress,
24 p. 5996 (Legislative History). As the Act provides for
25 different procedure on invocation of those provisions prior
26 to trial and subsequent thereto, and further expressly pro-

hibits an appellant's review relative to civil commitment on appeal, or otherwise under Section 2906 of the Act, which provides as follows:

"Sec. 2906. Absence of offer by the court to a defendant of an election under Section 2902(a) or any determination as to civil commitment, not reviewable on appeal or otherwise.

The failure of a court to offer a defendant an election under Section 2902(a) of this chapter, or a determination relative to civil commitment under this chapter shall not be reviewable on appeal or otherwise".

We shall not dwell on this phase but will limit our discussion to the failure of the Court to follow the post conviction procedure as provided in the Act in the following particulars:

1. To determine if the defendant was an eligible offender as defined in Section 4251(f). This section of the Act provides as follows:

"(f) 'Eligible offender' means any individual who is convicted of an offense against the United States but does not include -

(1) an offender who is convicted of

1 a crime of violence.

- 2 (2) an offender who is convicted of
3 unlawfully importing or selling
4 or conspiring to import or sell
5 a narcotic drug, unless the
6 court determines that such sale
7 was for the primary purpose of
8 enabling the offender to obtain
9 a narcotic drug which he requires
10 for his personal use because of
11 his addiction to such drug.
- 12 (3) an offender against whom there
13 is pending a prior charge of
14 a felony which has not been final-
15 ly determined or who is on pro-
16 bation, or whose sentence
17 following conviction on such
18 a charge, including any time
19 on parole or mandatory release,
20 has not been fully served:
21 Provided, that an offender on
22 probation, parole, or mandatory
23 release shall be included if
24 the authority authorized to re-
25 quire his return to custody
26 consents to his commitment".

1 The strong declaration of policy by Congress
2 indicates the intent of the statute and the desire of
3 Congress to provide for the treatment and rehabilitation of
4 narcotic addicts when they are charged with or convicted
5 of offenses against the United States. The defendant was
6 twenty-five years of age, had been using narcotics for
7 more than two years prior to the alleged offenses. It
8 would appear that he likewise came within the provisions of
9 the Young Adult Offenders section of Title 18, United States
10 Code. The Legislative History contains the following per-
11 tinent observations:

12 U. S. Code, Congressional Administrative News, 89th
13 Congress, pp. 5992 and 5993.

14 "STATEMENT

15 "H.R. 9167 was introduced in accordance with
16 the recommendations of the Department of Justice
17 and the Treasury Department.

18 The enactment of the bill will implement
19 one of the key objectives stated by President
20 Johnson in his 1965 message to the Congress on
21 law enforcement and the administration of jus-
22 tice. In that message the President stated:

23 The return of narcotic and marihuana users
24 to useful, productive lives is of obvious bene-
25 fit to them and to society at large. But at the
26 same time it is essential to assure adequate pro-

1 tection of the general public.

2 The bill was drafted to provide for the rehabi-
3 litation of narcotic addicts and includes pro-
4 visions which will protect the general public.
5 The committee amendments discussed in this
6 report are the result of that consideration and
7 are intended to further implement these basic
8 purposes.

9 The specific provisions of the bill were
10 the result of extended consideration and study
11 by the Department of Justice, Treasury, and
12 Health, Education, and Welfare. H. R. 9167,
13 in providing for the civil commitment of nar-
14 cotic addicts and the alternative of sentenc-
15 ing of addicts to treatment following conviction,
16 creates a new flexibility in the law for deal-
17 ing with the problem of narcotic addiction.
18 These procedures mark a fundamental reorientation
19 toward the problem of addiction. The Attorney
20 General in his testimony before the subcommittee
21 stated that for too long the law had stressed
22 punitive solutions and neglected medical and
23 rehabilitative measures. It also must be re-
24 cognized that the fight against narcotic addic-
25 tion cannot be considered apart from the
26 fight on crime. Narcotic addicts in their



1 desperation to obtain drugs often turn to crime
2 in order to obtain money to feed their addic-
3 tion. Organized crime profits from this
4 situation. On March 9, 1966, in his message
5 on crime and law enforcement, President Johnson
6 expressly noted these facts which he stated:

7 'Drug addiction is a double curse. It
8 saps life from the afflicted, it drives its
9 victims to commit untold crimes to secure the
10 means to support their addiction'.

11 In the same message, the President noted
12 that the existing procedures do not provide
13 the means to deal adequately with the problem
14 of narcotics addiction. He urged enactment
15 of the provisions embodied in this bill in
16 order to meet this need and stated:

17 'But our continued insistence on treating
18 drug addicts, once apprehended, as criminals,
19 is neither humane nor effective. It has
20 neither curtailed addiction nor prevented
21 crime'.

22 * * * * *

23 The committee has carefully considered this
24 legislation and in recommending it finds that
25 it provides the flexibility to enable Federal
26 authorities to treat the unfortunate addict

1 who is capable of rehabilitation to render assis-
2 tance in a manner which will enable him to
3 extricate himself from an otherwise hopeless
4 and repetitious pattern of addiction and crime.
5 The procedures provided by the bill in Title
6 I, II and III, do not essentially change the
7 authority being exercised by the law enforce-
8 ment officials or the courts in dealing with
9 persons charged with criminal offenses or con-
10 victed of such offenses. Rather the bill
11 provides alternatives which provide a needed
12 flexibility in the law. The practical effect
13 of the implementation of the law provided for
14 in the bill, is that strict punishment can be
15 meted out where required to the hardened criminal,
16 while justice can be tempered with judgment and
17 fairness to those cases where it is to the best
18 interest of society and the individual that
19 such a course be followed.

20 The problem of drug addiction involves
21 medical, psychological factors, as well as
22 the aspect of criminality. There are no
23 simple and easily attainable solutions to prob-
24 lems of this complexity. We feel that this
25 bill with the safeguards it contains will
26 provide an effective means for the United

1 States Government to mobilize its resources to
2 aid and rehabilitate that addict who can become
3 a useful and productive citizen. In its
4 efforts to combat narcotic addiction, the medi-
5 cal profession has developed improved methods
6 of treatment, and these continuing efforts have
7 added much to the knowledge concerning the
8 nature and treatment of addicted persons. The
9 testimony presented at the hearings has clearly
10 shown the need for the flexibility approaches
11 provided by civil commitment and post-conviction
12 commitment which would be made possible by
13 this legislation".
14

15 THE COURT ERRED IN FAILING TO
16 DETERMINE THE DEFENDANT'S ELIGI-
17 BILITY FOR TREATMENT AS A NARCOTIC
18 ADDICT UNDER THE STATUTE IN POST
19 CONVICTION PROCEEDINGS.

18 The defendant's affliction as an addict is without
19 contradiction. As the charge and conviction in this case
20 involved the sale of narcotics the record failed to disclose
21 whether "such sale was for the primary purpose of enabling
22 the offender to obtain a narcotic drug which he requires
23 for his personal use because of his addiction to such drug".

24 The trial court failed to determine the defendant's
25 eligibility under this basic requirement of the statute. We
26 have to ascertain the "primary purpose" of the sale.



1 The court exercised no discretion in the matter.

2 Bearing in mind the declared Congressional policy
3 it would appear that the purpose and policy of the law was
4 bypassed. It may be well to note, however, that the
5 Court did make its recommendation for "commitment to a
6 United States Public Health Hospital facility where the
7 defendant can receive treatment for possible narcotic
8 addiction". The recommendation, though laudable, has
9 no authority in law. If it was the opinion of the court
10 that the defendant be committed for treatment to a United
11 States Public Health Hospital facility the learned trial
12 judge should have first ascertained the defendant's eligi-
13 bility and upon ascertaining that the offense was committed
14 to enable him to obtain a narcotic drug for his personal
15 use because of his addiction, should then have followed
16 the procedure enunciated under the provisions of Sec.4252 of
17 Title 18 by commitment to the Attorney General for an
18 examination "to determine whether he is an addict and is
19 likely to be rehabilitated through treatment".

20 The section further provides "that the Attorney
21 General shall report to the Court within thirty days or
22 any additional period granted by the court the results
23 of such examination and make any recommendation he deems
24 desirable".

25 Section 4253 of Title 18 provides that following
26 the examination provided for in Section 4252, if the Court

1 determines that an eligible offender is an addict and likely
2 to be rehabilitated through treatment "it shall commit
3 him to the custody of the Attorney General for treatment
4 under this chapter except that no offender shall be committed
5 under this chapter if the Attorney General certifies that ade-
6 quate facilities or personnel for treatment are not avail-
7 able".

8 Thus it appears that upon the trial court ascertain-
9 ing that the defendant is an eligible offender and the
10 certification from the Attorney General the statute becomes
11 mandatory by the use of the words "shall commit" to the
12 custody of the Attorney General "for treatment under this
13 chapter".

14 The statute contemplates:

- 15 1) A determination of eligibility;
- 16 2) Commitment to the Attorney General for examina-
17 tion to determine whether defendant is an addict and likely
18 to be rehabilitated through treatment;
- 19 3) A report to the Court by the Attorney General
20 and;
- 21 4) A commitment to the Attorney General for treat-
22 ment after a determination by the Attorney General of defend-
23 ant's addiction and likelihood for rehabilitation.

24 The legislative history applicable to post convic-
25 tion procedure is clearly enunciated in the following lan-
26 guage taken in part from the United States Code, Congression-



1 al and Administrative News, 89th Congress, p. 5596:

2 "SENTENCING TO COMMITMENT FOR TREATMENT

3 The bill in Title II authorized an indeter-
4 minate sentence for treatment for a period not
5 to exceed 10 years for selected narcotic
6 addicts convicted of any Federal offense.

7 The bill, therefore, provides an alternative
8 to civil commitment in those cases where an
9 addict was not civilly committed prior to
10 trial and conviction. This means that treat-
11 ment is available to addicts who do not
12 choose civil commitment or were not chosen
13 for it by the court. It is also possible
14 that persons who did not complete the civil
15 commitment program successfully can be
16 considered for further treatment.

17 The fact that an individual was unsuccessful
18 in a course of treatment should not be taken
19 as a conclusive indication of subsequent
20 failure. In a statement filed with the com-
21 mittee, Mr. Roland W. Wood of the California
22 Rehabilitation Center quoted Mr. Richard A.
23 McGee, who is the administrator of the Youth
24 Corrections Agency of California, on the com-
25 plexity and difficulties in combating addic-
26 tion. Mr. McGee stated:



1 'If society naively expects today's tech-
2 nique to turn off addiction with a flick of
3 a needle or a single dose of treatment,
4 society is due for disillusionment. Society
5 has to learn that an addict's problems are
6 so varied and so deeply seated that repeated
7 treatment may be necessary before he ulti-
8 mately is free of his addiction'.

9 The maximum 10 year sentence provided in Section
10 4253 of the new chapter which would be added to Title
11 18, allows correctional and medical authorities a
12 desirable flexibility in treating individual addicts.
13 It also should be recognized that it provides a
14 lengthy period of sentence for those recalcitrant
15 offenders who do not respond to treatment.
16 Section 4252 provides for the examination of an
17 eligible offender when a court believes an
18 eligible offender is an addict. The examination
19 is for the purpose of determining whether in
20 fact he is an addict and is likely to be rehabi-
21 litated through treatment. This is different
22 from the procedure under the civil commitment
23 chapter because the offender is not asked to
24 elect. This then is a distinction between the
25 civil commitment procedure and the procedure provid-
26 ed in Title II".



1 * * * * *

2 "The provisions of Title II provide the court
3 with a further alternative. It has already been
4 noted that Title II makes it possible for the
5 court to make treatment available to addicts
6 who were not chosen for civil commitment or did
7 not make the required election. This committee
8 notes that the court will also be able to con-
9 sider those individuals who for one reason or
10 another did not complete the civil commitment
11 program. The provisions contained in Title
12 II provide for sentencing to commitment for
13 treatment, a procedure which may be described
14 as a problem-centered device which will actually
15 provide supervision and control for a much longer
16 period of time than a short-term commitment".
17

18 THIS TRIAL COURT ERRED IN FAILING
19 TO INVOKE THE STATUTORY PROCEDURE
20 UNDER THE 1966 NARCOTIC REHABILI-
TATION ACT

21 Title II of the Narcotic Addiction Statute, Sections
22 4251 and 4255 inclusive, appear to be the provisions appli-
23 cable in the instant matter. The post-conviction procedure
24 of Title II of the Bill is made a part of Title XVIII
25 the Code Title having to do with criminal procedures. The
26 legislative history of this portion of the Act is enlighten-

1 ing, and we quote:

2 "TITLE II

3 Section 4251

4 Subsection (b) is amended in the same
5 manner as parallel section 2901(c) of the
6 civil commitment chapter by insertion of the
7 word 'assault' to clarify the fact that
8 'assault with intent to commit any offense
9 punishable by imprisonment for more than
10 1 year' is included. Similarly the sub-
11 section is amended to include the offense of
12 conspiracy to commit any of the offenses
13 listed therein.

14 Subsection (c) is amended, as is subsection
15 2901(d), to insert the words 'confinement or'
16 to clarify the fact that 'treatment' may
17 include confinement in an institution within
18 the Federal penal system.

19 Subsection (d) is amended, in the same
20 manner as subsection 2901(e), to define
21 'felony' so as to classify Federal offenses
22 in accordance with section 1 of Title 18 and
23 other offenses in accordance with the place
24 the offense was committed.

25 Subsection (f) (2) is amended in a similar
26 manner as is subsection 2901(g) (2) to bar

1 individuals convicted of unlawfully importing
2 or selling or conspiring to import or sell a
3 narcotic drug. Similarly, the word 'primary'
4 in the exception concerning sale to obtain drugs
5 for personal use because of addiction is strick-
6 en and the word 'sole' substituted. Sub-
7 paragraph (5) of the same subsection (f) is
8 amended to change '1965' to '1966' and to add
9 a reference to the District of Columbia Code
10 in the references to civil commitment procedures.

11 Section 4252

12 The language in the third sentence concern-
13 ing certification as to the unavailability of
14 facilities and personnel is stricken to be
15 added in substantially the same form in
16 section 4253.

17 Section 4253

18 Subsection (a) is amended to make it clear
19 that the court is to act following the examina-
20 tion provided for in section 4252. The sub-
21 section is amended so that the power of the
22 court to commit a person to the Attorney General
23 under the chapter is expressly limited by the
24 exception that no one can be so committed
25 when the Attorney General certifies that
26 adequate facilities or personnel for treatment



1 are unavailable.

2 Subsection (b) is amended to clarify the
3 fact that following the examination provided
4 for in section 4252 the court can impose any
5 sentence authorized or required by law should
6 the court determine that an eligible offender
7 is not an addict or an addict not likely to be
8 rehabilitated". (See U. S. Code Congressional
9 and Administrative News, 89th Congress, pp.
10 5991 and 5992).

11
12 Section 4252 provides as follows:

13 "Sec. 4252. Examination.

14 If the court believes that an eligible
15 offender is an addict, it may place him in the
16 custody of the Attorney General for an examina-
17 tion to determine whether he is an addict and
18 is likely to be rehabilitated through treatment.
19 The Attorney General shall report to the court
20 within thirty days; or any additional period
21 granted by the court, the results of such
22 examination and make any recommendations he
23 deems desirable. An offender shall receive
24 full credit toward the service of his sentence
25 for any time spent in custody for an examina-
26 tion". (U. S. Code Congressional and Adminis-

trative News, 89th Congress).

It would appear therefore that the commitment for examination is discretionary, tempered by the declaration of policy of Congress quoted above. It is the writer's belief and opinion after exhaustive study of the Code, its purpose and policy, that narcotic addicts be exclusively handled by the courts under the provisions of the Narcotic Addict Rehabilitation Act of 1966.

We have been unable to determine or establish that any other procedure is applicable. The recommendation by the Court to the Attorney General in the instant proceeding, that the defendant be committed to a public health hospital for treatment for his narcotic addiction is without authority of law and does not accomplish the designed intent of the Court. The Attorney General's authority is likewise maintained by the same narcotic addiction statute.

Under Section 4253 after placement of the eligible offender in the custody of the Attorney General for examination and the results of his report communicated to the Court within thirty days, the Court upon ascertaining that the eligible offender is an addict and likely to be rehabilitated through treatment, the Code provides that the court "shall commit him to the custody of the Attorney General for treatment". Section 4253 - this portion of the Code is no longer discretionary but its language indicates that it is mandatory.



1 Section 4253(b) provides as follows:

2 "Sec. 4253 - Commitment.

3 (a) Following the examination provided
4 for in section 4252, if the court determines that
5 an eligible offender is an addict and is likely
6 to be rehabilitated through treatment, it shall
7 commit him to the custody of the Attorney General
8 for treatment under this chapter, except that
9 no offender shall be committed under this
10 chapter if the Attorney General certifies that
11 adequate facilities or personnel for treatment
12 are unavailable. Such commitment shall be
13 for an indeterminate period of time not to
14 exceed ten years, but in no event shall it
15 exceed the maximum sentence that could other-
16 wise have been imposed.

17 (b) If, following the examination provided
18 for in section 4252, the court determines that
19 an eligible offender is not an addict, or is
20 an addict not likely to be rehabilitated
21 through treatment, it shall impose such other
22 sentence as may be authorized or required by
23 law".

24 The procedure provided by law requires the Court to
25 invoke the process for narcotic rehabilitation prior to the
26 imposition of sentence. We respectfully contend that the

1 Court did intend that the defendant receive the benefits
2 of the Act for narcotic rehabilitation. However, the
3 adopted procedure did not comply with the statutory author-
4 ity.

5 It is, therefore, respectfully prayed that the
6 case be remanded to the trial court for further proceedings
7 under the Narcotic Rehabilitation Act of 1966.

8
9
10 Respectfully submitted

11 RUSSELL A. PARSONS
12 DAVID C. MARCUS

13 By David C. Marcus
14 David C. Marcus
15 Attorneys for Appellant
16
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26

CERTIFICATION OF COUNSEL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Davidson
Attorney.

1 PROOF OF SERVICE BY MAIL
2 1013a and 2015.5 C. C. P.

3 STATE OF CALIFORNIA)
4) ss.
COUNTY OF LOS ANGELES)

5 I, the undersigned, say: I am and was at all times herein
6 mentioned, a citizen of the United States and employed in
7 the County of Los Angeles, over the age of eighteen years
and not a party to the within action or proceeding; that

8 My business address is 215 West Fifth Street, Los Angeles,
9 California 90013, that on October 11, 1967, I served the
10 within APPELLANT'S OPENING BRIEF (Fred Patrick Meyers v.
11 United States of America, Criminal No. 21821) on the follow-
ing named parties by depositing a copy thereof, enclosed
in a sealed envelope with postage thereon fully prepaid,
in the United States Post Office in the City of Los Angeles,
California, addressed to said parties at the addresses as
12 follows:

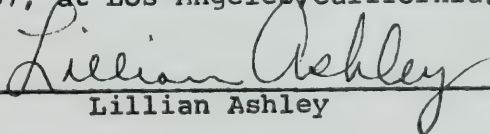
13 United States Attorney
14 Sixth Floor Federal Building
Los Angeles, California 90012

15 Solicitor General of the United States
16 Washington 17, D. C.

17 United States District Court
18 Federal Building
312 North Spring Street
Los Angeles, California
For: Hon. Jesse W. Curtis, Jr.

19
20 I certify and declare under penalty of perjury that the
21 foregoing is true and correct.

22 Executed on October 11, 1967, at Los Angeles, California.

23 
24 Lillian Ashley
25
26

N O. 2 1 8 2 1
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRED PATRICK MEYERS,

Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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FILED

NOV 1 1967

WM. B. LUCK, CLERK

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRED PATRICK MEYERS,

Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF PLEADINGS AND FACTS
DISCLOSING JURISDICTION

On December 22, 1966, the Federal Grand Jury for the Central District of California returned an indictment in five counts. Four counts of this indictment charged that Fred Patrick Meyers committed the following offenses within the Central District of California:

Count I: Violation of Title 21, United States Code, Section 174, in that on or about September 22, 1966, defendant Meyers knowingly and unlawfully received, concealed, and facilitated the concealment and transportation of 24.655 grams of heroin which he

knew had been previously unlawfully imported.

Count II: Violation of Title 21, United States Code, Section 174, in that defendant Meyers sold to Agent David L. Westrate of the Federal Bureau of Narcotics the 24.655 grams of heroin described in Count I above.

Count III: Violation of Title 21, United States Code, Section 174, in that on or about October 3, 1966, defendant Meyers and Lois Ellen Blalock sold and facilitated the sale to an undercover assistant of the Federal Bureau of Narcotics 37.140 grams of heroin which they knew had been previously unlawfully imported.

Count V: A violation of Title 21, United States Code, Section 176(a), in that on or about October 18, 1966, defendant Meyers knowingly and with intent to defraud the United States, received, concealed, and facilitated the transportation and concealment of 720.400 grams of marihuana which he knew had been previously unlawfully imported into the United States [C. T. 1-6]. ^{1/} During trial Count Five was dismissed on motion of the government [R. T. 56].

On January 5, 1967, the Court, being informed that there is reasonable cause to believe that the defendant and appellant was insane or otherwise mentally incompetent, appointed Dr. Edwin McNeil, Dr. Frederick Wetzel and Dr. Patrick J. Lovelle to examine defendant Meyers with specific instructions to report to the Court concerning the sanity of said defendant on the date of said

^{1/} C. T. refers to Clerk's Transcript and R. T. refers to Reporter's Transcript.

examination and whether the said defendant was presently under the influence of narcotics and to render their report in writing to said Court with copies thereof to defendant Meyers' counsel.

On January 1, 1967, a waiver of jury trial was filed and defendant Meyers was arraigned and plead not guilty [C. T. 11-13]. A court trial was held on February 8, 1967, before the Honorable Jesse W. Curtis, United States District Judge. Motions for judgment of acquittal made at the close of the government's case and renewed at the close of the defendant's case were denied. The defendant was found guilty on Counts One, Two, and Three.

On February 17, 1967, appellant filed a motion for new trial.

On March 6, 1967, an information was filed charging that on or about the 26th of April, 1965, defendant Meyers was convicted of a violation of Title 26, United States Code, Section 4724(a), the importation of narcotics without payment of taxes, and was sentenced by the court for a period of three years, execution of the sentence being suspended and the defendant placed on probation for a period of three years on certain conditions, namely, that he not use barbiturates, marijuana or narcotics in any form, nor associate with users, nor approach the Mexican Border, nor enter Mexico, and to submit to Naline tests as the Probation Department may require [C. T. 31-32]. On April 10, 1967 the trial court found the allegation contained in the information was true [R. T. 171].

On April 10, 1967, defendant Meyers was sentenced to imprisonment for a period of ten years each on Counts One, Two

and Three to run concurrently, with a recommendation that defendant be committed to a United States Public Health Hospital facility for treatment for possible narcotic addiction [C. T. 38].

On April 20, 1967, defendant filed a timely notice of appeal [C. T. 42].

Jurisdiction of the District Court was based on Title 18, United States Code, Section 3231 and Title 21, United States Code, Section 174. Jurisdiction of this Court is based on Title 28, United States Code, Section 1294(1) and Rule 37(a) of the Federal Rules of Criminal Procedure.

II

STATUTE INVOLVED

Title 21, United States Code, Section 174, provides in pertinent part, as follows:

"Whoever fraudulently or knowingly . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any . . . narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000

"For a second or subsequent offense the

offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than \$20,000."

III

QUESTION PRESENTED

Whether the trial court properly sentenced the addicted defendant to ten years imprisonment for the sale and concealment of heroin under Title 21, United States Code, Section 174, rather than under Title 18, United States Code, Section 4251.

IV

STATEMENT OF THE FACTS

On or about September 22, 1966 an agent and an undercover assistant of the Federal Bureau of Narcotics met the defendant Fred Meyers at a Standard Service Station [R. T. 57 and 58]. The agent and assistant told the defendant that they were selling heroin in small amounts and that the heroin they wanted to purchase would be broken up and sold to several people [R. T. 60]. Meyers stated that he had heroin "stashed" a few blocks away. When asked by the agent to get the heroin and bring it to the station so that a sale could be consummated, the defendant said that he did not know the agent and didn't want to do it that way [R. T. 60]. The defendant stated that the assistant could go with him to a nearby location where the

heroin was hidden and then the defendant would return to the agent for the money [R. T. 61]. The assistant and the defendant then proceeded in the defendant's automobile to an open field on Napa Street and the defendant indicated the location of a prophylactic containing heroin [R. T. 13]. On the return trip to the service station, the defendant told the assistant that "it was good junk" and his "customers would like it" [R. T. 14]. The defendant also directed the assistant to let him know if he needed any more within a couple of days, but to come alone since he didn't know the agent and didn't trust anybody [R. T. 14].

The defendant and the assistant subsequently returned to the service station. The assistant told the agent that "everything was all right, it was as Mr. Meyers had said it would be" [R. T. 62]. The defendant then asked the agent for the money. The agent took \$300 in government funds and attempted to hand it to the defendant. However, the defendant said, "No, No. Hold it out so I can see it and count it." After the agent counted the money, he again attempted to hand the money to the defendant but the defendant stated that he didn't want to touch the money. He directed the agent to put the money on the back seat of the automobile and the agent complied [R. T. 63]. Defendant Meyers then told the agent that the heroin was good but "not to cut it and that the agent's customers would be happy with it". His parting statement was, "Be careful who you deal to. There is a lot of Heat and you can't trust anybody." [R. T. 64].

The agent and assistant then proceeded to the previously described Napa Street location where the assistant pointed out a

rubber contraceptive containing heroin next to the sidewalk in high grass [R. T. 65 and 66].

On or about October 3, 1966, the assistant and agent telephoned Fred Meyers and made arrangements to purchase 40 grams of heroin for \$500 [R. T. 69 and 70]. Defendant Meyers told the assistant that he would not sell the heroin if the agent were there because he didn't trust the agent [R. T. 20 and 71]. Defendant Meyers then met with the assistant at a Safeway Market and told the assistant to follow him in the assistant's car [R. T. 20]. The defendant proceeded in his own car to a nearby location, followed by the assistant [R. T. 21]. They alighted from their automobiles and the assistant followed the defendant to another vehicle that was parked on the corner [R. T. 21]. The assistant gave defendant Meyers \$500. A female sitting in the automobile then handed the assistant a prophylactic containing approximately 40 grams of heroin [R. T. 22]. The assistant then placed the contraceptive on the front seat of the automobile and returned to the agent [R. T. 22 and 73].

In his defense, appellant denied selling or giving heroin to the agent and assistant on September 22 and October 3, 1966 [R. T. 99-108]. He also asserted that he had been previously convicted of grand theft, burglary and failing to pay tax on heroin that he had smuggled [R. T. 99].

ARGUMENT

- A. SENTENCE OF THE APPELLANT UNDER TITLE 21, UNITED STATES CODE, SECTION 174 WAS LAWFUL AND PROPER IN ALL RESPECTS, AND IN FULL ACCORDANCE WITH THE PROVISIONS OF THE NARCOTIC REHABILITATION ACT OF 1966.
-

Appellee concedes that the appellant in this case was addicted to the use of narcotics at the time he was examined by various doctors [App. Br. , pp. 11-13, 19-21]. However, there is nothing in reported cases or in statutes and testimony cited by appellant which would compel the trial court to sentence the defendant under the Narcotic Rehabilitation Act of 1966. Title 18, United States Code, Section 4251, et seq.

On the contrary, the record indicates that this appellant is ineligible to be sentenced under this act. Title I excludes from eligibility an individual charged with unlawfully selling a narcotic drug. Title 28, United States Code, Section 2901(g)(2). Title II excludes defendants who have been convicted of a felony on two or more prior occasions. Title 18, United States Code, Section 4251(c)(4). The record in this case, including appellant Meyers' own testimony, indicates that appellant was convicted of three prior felonies and would therefore be ineligible [R. T. 99, 171].

Even admitting for purposes of argument only that appellant was eligible to be sentenced under the Narcotic Rehabilitation Act of

1966, the sentence of the trial court was lawful and proper in all respects. Title 21, United States Code, Section 174, provides that whoever sells any narcotic drug after it has been illegally imported, knowing it to have been imported into the United States contrary to law, shall be imprisoned not less than five or more than twenty years. Therefore, the ten-year sentence of the trial court was well within the statutory limits provided by Congress for sale of heroin and may not be disturbed on appeal.

United States v. Cohen, 177 F.2d 523, 525

(2nd Cir. 1949), cert. denied 70 S. Ct. 568.

If there is one rule in the Federal Criminal Practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute.

Gurara v. United States, 40 F.2d 338, 340

(8th Cir.);

United States v. Rosenberg, 195 F.2d 583, 604

(2nd Cir. 1952).

Nor is there anything in the Narcotic Rehabilitation Act of 1966 which would support appellant's contention that the court erred in failing to invoke the statutory procedure under that statute. As indicated previously, the record indicates that the defendant is not eligible under the Act. The Act further indicates that invocation of its procedures is entirely discretionary with the trial court. As appellant admits, the provisions applicable to this matter are contained under Title II of the Act, 18 United States Code, Sections 4251 - 4255 inclusive. Appellant also admits that commitment for

an examination under Section 4252 is discretionary with the court [App. Br. p. 45]. ^{2/} Final commitment to the Attorney General for treatment under Section 4253 may not be invoked until the judge has decided to order an examination. By making the order for examination of convicted defendants under the act discretionary with the trial court, and by leaving the sentencing procedures of Title 21 untouched, the intent of Congress to leave to the trial court the alternative of invoking either sentencing procedure is clear.

That this was the Congressional intent is further indicated by the enactment of Title VI of the Narcotic Rehabilitation Act of 1966. This section provides that:

"The Surgeon General is authorized to provide for confinement, care, protection, treatment, and discipline of persons addicted to the use of habit-forming narcotic drugs . . . [who have been] . . . convicted of offenses against the United States and who are not sentenced to treatment under the Narcotic Addict Rehabilitation Act of 1966" Title 42, United States Code, Section 257(a) (emphasis added).

The sentence of the trial court here under attack was in full accord with the spirit and purpose of the Narcotic Rehabilitation Act

^{2/} Title 18, United States Code, Section 4252 provides in pertinent part: "If the court believes that an eligible offender is an addict, it may place him in the custody of the Attorney General for an examination to determine whether he is an addict and is likely to be rehabilitated through treatment." (emphasis added).

of 1966. Title VI, quoted in pertinent part above, clearly contemplates that there will be narcotic addicts not sentenced under the discretionary provisions of Title II. That section provides facilities for the care, protection, treatment, and discipline of such persons. The recommendation of the trial court to the Bureau of Prisons that the defendant be "incarcerated in a hospital where he can receive help for his addiction" is a clear indication of the trial court's intention that the provisions of Title VI be utilized for this defendant.

It is further submitted that the trial court had good reason for imposing the ten-year sentence and recommending hospitalization. This appellant had, by his own admission, been convicted of three prior felony offenses. At trial he denied making the sales of heroin in ounce quantities for which he was subsequently convicted in the case at bar [R. T. 99-108]. As defense counsel pointed out to the trial court immediately after sentence was imposed:

"You have expressed yourself candidly and fairly with us that you feel that he (the defendant) must be protected not only from himself but also that society must be protected." [R. T. 190].

In view of the provisions in Title II that an offender committed under Section 4253(a) may be conditionally released after six months (Title 18, United States Code, Section 4254), it is submitted that the sentence and recommendation by the trial court in this case was both fair and wise under the circumstances.

VI

CONCLUSION

Since the sentence of the appellant was a lawful and proper exercise of the trial court's discretion under Title 21, United States Code, Section 174, and under the Narcotic Rehabilitation Act of 1966, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Michael D. Nasatir
MICHAEL D. NASATIR

NO. 21822

IN THE UNITED STATES COURT OF APPEALS
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FRED STEIN,

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vs.

UNITED STATES OF AMERICA,

Appellee.

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FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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FILED

JUL 11 1967

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IN THE UNITED STATES COURT OF APPEALS
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FRED STEIN,

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APPELLEE'S BRIEF

I

JURISDICTION

This is an appeal from an order of the United States District Court for the Southern District of California, entered January 4, 1967, denying appellant's Motion to Vacate and Set aside his sentence, judgment and indictment under the provisions of Title 28, United States Code, Section 2255.

The jurisdiction of the District Court rested on Title 18, United States Code, Section 371, Title 21, United States Code, Section 174, and Title 28, United States Code, Section 2255.

This Court has jurisdiction to review the judgment of the District Court denying appellant's "2255 Motion," pursuant to

II

STATUTE INVOLVED

Title 28, United States Code, Section 2255 provides as follows:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issue and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by

law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to

test the legality of his detention, "

III

STATEMENT OF THE CASE

On March 5, 1958, a six count indictment was returned by the Grand Jury for the Southern District of California, charging conspiracy and sale of heroin in violation of Title 18, United States Code, Section 371, and Title 21, United States Code, Section 174. On September 22, 1958, appellant was convicted after a court trial before the Honorable Peirson M. Hall, United States District Judge, on Counts Two, Three, Four, Five and Six of the indictment. On September 23, 1958, the petitioner was sentenced to the custody of the Attorney General for imprisonment for a period of twenty years on Count One; Twenty years on Count Three, to run concurrent with and not consecutive to the sentence on Count One; ten years on Count Four to run consecutive to and not concurrent with sentence on Counts One and Three; ten years on Count Five to run consecutive to and not concurrent with sentence on Count Four; ten years on Count Six to run consecutive with and not concurrent with Sentence on Count Five, making a total of fifty years.

Thereafter, the appellant appealed this conviction and sentence which was affirmed by the Court of Appeals for the Ninth Circuit on November 16, 1959, 271 F.2d 895.

On February 26, 1960, appellant filed a petition for writ of certiorari which was denied by the Supreme Court on April 18, 1960,

On September 28, 1961, appellant filed his first motion pursuant to Title 28, United States Code, Section 2255. On May 17, 1962, the District Court denied the motion. On June 11, 1962, petitioner appealed the District Court's ruling to the Court of Appeals for the Ninth Circuit where the Court of Appeals affirmed the denial of the appellant's motion, 313 F.2d 518 (1962), cert. denied, 375 U. S. 872.

On May 27, 1966, the appellant filed the instant 2255 motion alleging:

(1) That the Government knowingly used perjured testimony, and (2) that appellant's trial counsel acted in collusion with agents of the United States so as to deprive him of effective assistance of counsel.

On January 4, 1967, this motion was denied by the District Court. It is from this denial of that motion that the present appeal arises.

IV

ARGUMENT

A. APPELLANT'S MOTION WAS PROPERLY
DENIED AS TO THE PROSECUTION'S
ALLEGED KNOWING USE OF PERJURED
TESTIMONY

The movant in a 2255 proceeding has the burden of sufficiently

alleging, as well as proving by a preponderance of the evidence, that his constitutional rights were violated at the trial, and such burden is particularly severe if the judgment of conviction has already been affirmed.

Twining v. United States, 321 F. 2d 432 (5th Cir.

1963), cert.den. 376 U. S. 965 (1964);

Miller v. United States, 261 F. 2d 546 (4th Cir. 1958);

Bishop v. United States, 223 F. 2d 582 (D. C. Cir.

1955), vacated on other grounds, 350 U. S.

961 (1956);

United States v. Robinson, 143 F. Supp. 286

(W. D. Ky. 1956).

It is well established law that a judgment and sentence will not be vacated on the ground of perjured testimony unless the moving party alleges, and later shows by a preponderance of the evidence, that (1) the testimony was perjured, and (2) the prosecuting officials knowingly and intentionally used such testimony to secure a conviction.

Mooney v. Holohan, 294 U. S. 103, 112 (1935);

Black v. United States, 269 F. 2d 38 (9th Cir. 1959),

cert.den. 361 U. S. 938 (1960);

Holt v. United States, 303 F. 2d 791 (8th Cir. 1962);

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1957), cert.den 353 U.S. 939 (1957), reh.den.
353 U.S. 978 (1957);

Taylor v. United States, 229 F.2d 826 (8th Cir.

1956), cert.den. 351 U.S. 986 (1956);

United States v. Rutkin, 212 F.2d 641 (3rd Cir. 1954);

Tilghman v. Hunter, 167 F.2d 661 (10th Cir. 1948).

The movant additionally must prove that the alleged perjured testimony was so material as to contribute to the conviction and of such substance, in relation to the evidence at trial, as to violate movant's right to due process.

Perry v. United States, 297 F.2d 100 (9th Cir. 1962);

Weaver v. United States, 263 F.2d 577 (8th Cir.

1959), cert.den. 359 U.S. 1014 (1959);

Griffin v. United States, 258 F.2d 411 (D. C. Cir.

1958), cert.den. 357 U.S. 922;

Smith v. United States, supra;

United States v. Gonzalez, 33 F.R.D. 280

(S.D. N. Y. 1960), aff'd 321 F.2d 638 (2nd
Cir. 1963).

Specifically appellant alleged that the Government knowingly used perjured testimony in that Quentin Browning, Clarence Winfrey and Celeste Winfrey, unindicted co-conspirators, falsely testified against the appellant at his trial.

1. Testimony of Unindicted Co-Conspirator
 Browning.

The sole issue at trial was whether or not appellant conspired to and did sell heroin to Clarence and Celeste Winfrey. The Winfreys testified that they purchased heroin from appellant, and Browning corroborated their testimony.

Appellant alleged that Browning falsely testified that he was not addicted to heroin. The unsubstantiated allegation that Browning's testimony was perjured merely questions the witness' credibility, which is not reviewable under a Section 2255 motion. Browning's alleged addiction is clearly immaterial to the sole factual issue presented at trial, and therefore even clear proof of this allegation would not be grounds for vacating appellant's judgment and sentence.

Appellant's allegation that Browning falsely denied that his testimony was motivated by promises affecting his own illegal activities is not substantiated by any evidence. The motion simply states the conclusion. Thus, this allegation merely questions the credibility of the witness when he gave this testimony. An appellate court will not second guess the trier of fact who has heard the testimony, scrutinized the witness and noted their demeanor and behavior on the witness stand.

Davis v. United States, 327 F.2d 301 (9th Cir. 1964);

Maldonado v. United States, 325 F.2d 295 (9th Cir.

1963);



Perez v. United States, 297 F.2d 648 (9th Cir. 1961).

This rule is especially strong in proceedings under Section 2255.

Dean v. United States, 265 F.2d 544 (8th Cir. 1959);

United States v. Rosenberg, 200 F.2d 666, 671

(2nd Cir. 1952), cert.den. 345 U.S. 965 (1953),

rehearing denied, 345 U.S. 1003 (1953).

The above allegations by appellant as well as those following and discussed in paragraph B of this brief, are completely unsubstantiated either by testimony or the record and files in this matter. It is well established that mere conclusionary allegations are not sufficient to warrant relief under a 2255 motion.

Sanders v. United States, 373 U.S. 1;

United States v. Miller, 339 F.2d 581 (9th Cir. 1964);

Heisler v. United States, 321 F.2d 641

(9th Cir. 1963).

2. The Proffered New Evidence is Merely
Rebuttal to the Winfrey's Testimony and
Cannot be Considered under Rule 33,
Federal Rules of Criminal Procedure.
-

Appellant offers his motion to produce "recently acquired proof which will refute in toto" the Winfreys' testimony. Such evidence does not present the new factual question of perjury, thereby requiring a full hearing under Section 2255; rather it is simply an offer of new evidence going to the issue which was



originally presented at trial.

Rule 33 of the Federal Rules of Criminal Procedure permits the Court to consider new evidence "within two years after final judgment." Since appellant's appeal from his conviction was finalized more than seven years ago, Stein v. United States, 271 F.2d 895 (9th Cir. 1959), cert.den. 362 U.S. 950 (1960), this new evidence cannot now be considered.

B. APPELLANT'S MOTION WAS PROPERLY
DENIED AS TO THE ALLEGED
COLLUSION BETWEEN TRIAL COUNSEL
AND PROSECUTION AS THIS ISSUE WAS
PREVIOUSLY DISPOSED OF ON DIRECT
APPEAL.

It is well settled that issues disposed of on a previous direct appeal are not reviewable in a subsequent petition under Section 2255.

Marcella v. United States, 344 F.2d 876, 880
(9th Cir. 1965), cert.den. 382 U.S. 1016
(1966);

Anthony v. United States, 331 F.2d 687, 693
(9th Cir. 1964);

United States v. Bailey, 337 F.2d 218 (9th Cir. 1964);
Medrano v. United States, 315 F.2d 361 (9th Cir.
1963) cert.den. 375 U.S. 854 (1963);

Fiano v. United States, 291 F.2d 113 (9th Cir. 1959),
cert.den. 368 U.S. 943 (1961);

In his direct appeal from conviction appellant argued in Point III of his brief that "Attorney Sweeney's defense of the appellant in trial was inadequate and incompetent, so much so that the appellant did not have a trial within the meaning of the Sixth and Eighth Amendments of the constitution."

The Court of Appeals in its opinion discussed the question of competent counsel at great length and concluded at 271 F.2d 895 at p. 899:

"I know of nothing that any other or additional counsel could have done that you, Mr. Sweeney, didn't do in the protection of this defendant's rights. The case was tried skillfully and adroitly on behalf of defendant by you. We ask the question, what defenses were open to a defendant where the witnesses were fellow law breakers other than to attack their credibility? Mr. Sweeney did this by an able cross-examination. In this examination he exhibited no terror. He was alert and prompt with objections and forceful in argument. Our experience as trial judges for many years, from which we cannot disassociate ourselves, convinces us that appellant received a better than average defense and that his interests were fully and expertly protected."

In contrast to this summary of an able defense by an "adroit"

and "skillful" trial counsel, it has often been said that where trial counsel was of appellant's own choosing, as was the case here, a charge of inadequate representation can prevail only if "what was or was not done by the defendant's attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the Court. "

Cofield v. United States, 263 F.2d 686, 689 (9th Cir. 1959), rev'd. on other grounds, 360 U.S. 472 (1959);

United States v. Miller, 254 F.2d 523 (2nd Cir. 1958); cert.den. 358 U.S. 868 (1958);

O'Malley v. United States, 285 F.2d 733 (6th Cir. 1961);

Mitchell v. United States, 259 F.2d 787, 792 (D. C. Cir. 1958), cert.den. 358 U.S. 850 (1958);

Diggs v. Welch, 148 F.2d 667, 670 (D. C. Cir. 1945), cert.den. 325 U.S. 889 (1945).

The same above quoted characteristic of trial counsel noted by this Court in the original appeal are equally applicable in disproving the allegation of collusion. It is inconsistent that defense counsel who "skillfully and adroitly" represented the appellant at trial, who ably cross-examined, was alert and prompt with objections and who forcefully argued the case can now be properly accused of consorting with the prosecution.

Moreover, the allegation is unsubstantiated. In his brief,

appellant claims only that if the officials were put under oath they "would be required to sustain the allegations contained in the motion." We submit that appellant is simply on a fishing expedition, and that the thorough consideration given to this entire subject by this Court on the previous direct appeal precludes the relitigation now sought by appellant.

CONCLUSION

The trial court properly denied the instant motion on the grounds that the alleged perjury was not material to the central issue at trial and that the introduction of new evidence if there be any is barred by Rule 33 of the Federal Rules of Criminal Procedure.

The records, files and petition do not support appellant's contention that defense counsel was in collusion with Government agents. On the contrary appellant received effective, competent and forceful assistance of counsel.

The District Court did not err in denying appellant's 2255 motion on the above grounds and its judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert M. Talcott

ROBERT M. TALCOTT

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

JOE R. RAMOS AND MARY RAMOS, APPELLEES

**On Appeal From the Judgment of the United States
District Court for the Northern District of California**

BRIEF FOR THE UNITED STATES AS APPELLANT

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FILED

AUG 23 1967

WM. B. LUCK, CLERK

AUG 23 1967



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 21824

UNITED STATES OF AMERICA, APPELLANT

v.

JOE R. RAMOS AND MARY RAMOS, APPELLEES

**On Appeal From the Judgment of the United States
District Court for the Northern District of California**

BRIEF FOR THE UNITED STATES AS APPELLANT

OPINION BELOW

The memorandum opinion and order of the United States District Court for the Northern District of California (I-R. 50-72) and the amendment thereto (I-R. 73-74) are not officially reported.

JURISDICTION

This appeal involves federal income taxes. The taxes in dispute for the year 1956 were paid as follows: \$57,902.93 plus interest of \$8,894.84 on Decem-

ber 15, 1959. (I-R. 39.) Claim for refund was filed on December 15, 1959 (I-R. 39), and was rejected on October 20, 1960 (I-R. 39). The taxes in dispute for the year 1957 were paid as follows: \$50,-458.31 plus interest of \$4,723.73 on December 15, 1959. (I-R. 40.) Claim for refund was filed on December 15, 1959 (I-R. 40), and was rejected on October 20, 1960 (I-R. 41). Within the time provided in Section 6532 of the Internal Revenue Code of 1954, on July 5, 1961, taxpayers brought an action in the District Court for the recovery of taxes paid for the year 1957. (I-R. 1-4.) Also within the time provided in Section 6532, on September 14, 1961, taxpayers brought an action in the District Court for the recovery of taxes paid for the year 1956. (I-R. 5-8.) Jurisdiction was conferred on the District Court in both cases by 28 U.S.C., Section 1346. The cases were consolidated on April 24, 1962. (I-R. 22) The judgment of the District Court was entered on December 15, 1966. (I-R. 75) Within sixty days thereafter, on February 9, 1967, the United States of America filed a notice of appeal. (I-R. 76.) Within fourteen days thereafter, on February 23, 1967, taxpayers filed a notice of appeal and/or cross-appeal. (I-R. 77.)¹ Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

¹ Pursuant to the order of this Court dated July 28, 1967, concerning the time for filing briefs in these cases, this brief is confined to the appeal of the United States. Another brief will be filed by the United States in reply and answer to the points raised in the taxpayers' brief which is to be filed on October 9, 1967.

QUESTIONS PRESENTED

1. Whether the District Court erred in holding that there was a valid family partnership composed of taxpayers (Joe R. and Mary Ramos) and their children during 1956 and a valid family partnership composed of taxpayer Joe R. Ramos and the children in 1957 and in failing to hold that there was involved herein a mere assignment of future income arising from the property and services of taxpayers.

2. Assuming *arguendo* that question 1 above should be answered "yes", the further question will arise as to whether the District Court, having found valid family partnerships to have existed during 1956 and 1957, failed to properly allocate the income thereof so as to credit taxpayers with a reasonable return on their capital.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statute and Regulations involved are set out in Appendix A, *infra*.

STATEMENT

The basic facts are virtually undisputed (I-R. 54), and, as supported by the record evidence, may be stated as follows:

Taxpayers, Joe R. and Mary Ramos,² are husband and wife and reside on a 219-acre ranch near Winters, California. (I-R. 37, 56.) They purchased this

² Unless otherwise indicated by the text, the singular "taxpayer" used hereinafter refers to Joe R. Ramos.

ranch in the latter part of 1943 and have lived on and farmed it continuously from that time. (II-R. 6-8, 18.) Approximately 175 acres of the ranch are planted in mature almond trees with the balance being planted in peaches and olives. (II-R. 7.) The land, trees and other improvements which comprised the taxpayers' ranch and the equipment necessary for its operation had a value of \$200,000 to \$230,000 during 1956 and 1957, the years in suit. (II-R. 129-134.)

Taxpayers' daughter, Dolores Donaldson, was 24 years old in 1956 and by that year had graduated from Sacramento Junior College and was married. (I-R. 38; II-R. 8, 142-143.) From the time she was in high school, Dolores had done the bookkeeping for the ranch as well as for her parents' other business ventures. She was paid for these services (II-R. 10-11, 102, 144-145, 297-300) and in 1955 received \$75 for this work (II-R. 296).

Taxpayers' son, Joe S. Ramos, had worked on taxpayers' ranch on weekends and during vacations from school. From the time he graduated from high school, he was paid for his work. (II-R. 10-12, 40, 417.) After he graduated from Sacramento Junior College in June of 1955, he worked on the ranch and was paid accordingly. (II-R. 26, 37-39, 105-106.) On November 22, 1955, Joe S. Ramos went on active duty with the United States Navy and was shortly thereafter transferred to Hawaii. (I-R. 38; II-R. 429-430.) At the beginning of the period in suit, Joe S. Ramos was 21 years old. (I-R. 38.)

Taxpayer's brother, Frank D. Ramos, was foreman of the ranch prior to the years in suit and throughout the period Joe S. Ramos was in the Navy. (II-R. 37-39.)

As of January 1, 1956, a "family partnership" composed of the taxpayers and their children, Dolores Donaldson and Joe S. Ramos, purportedly was to commence.³ (II-R. 18, 153, 155, 161, 427, 483.) This partnership was to operate taxpayers' ranch for the year 1956, with each of the four partners having a 25 percent interest in the business. (II-R. 18-19, 21, 154-155, 428.) The partnership acquired no interest in the land, trees and other improvements which made up the taxpayers' ranch or in the equipment necessary for its operation, as these assets were retained by taxpayers. The partnership did not pay any rent in 1956 for these assets. (II-R. 20-21, 155-156, 483-484, 488.) Neither Dolores Donaldson nor Joe S. Ramos contributed any capital to the partnership for 1956. (II-R. 20, 301-302.)

During 1956, the ranch continued to operate under the name of "Joe R. Ramos." (II-R. 99; Ex. 35.) The expenses for operating the ranch for that year were paid from taxpayers' joint checking account with the Bank of America at Winters, with the re-

³ For convenience only, the terms "partner" and "partnership" are used occasionally in this brief in referring to the members of the Ramos family in their purported business relationships during the years in suit. The Government does not intend any inference to be drawn therefrom with respect to the validity of those arrangements for federal income tax purposes.

ceipts from the operation of the ranch being deposited to that account. (II-R. 120-121, 238-239; Ex. 6, pp. 2-15.) This account included funds other than partnership funds. (II-R. 236-237.) The accounting records for the 1956 ranch operations were kept on the cash basis and were merely a continuation of the individual records maintained for taxpayers in previous years. (I-R. 43, 63; II-R. 311-312, 318-328, 524-527, 557-558; Ex. 6, pp. 2-15; Ex. 7, p. A.)

The 1956 federal employer's withholding tax return for the ranch employees was filed in the name of "Joe R. Ramos, owner" and under the account number assigned to him.⁴ The workmen's compensation report for that year was also filed under taxpayer's name. (Ex. 47, Ex. A.)

Because of his experience, taxpayer was senior partner and "boss" of the partnership. (II-R. 20, 159, 429.) He made the decisions concerning the sale of crops grown on the ranch and generally supervised the ranch operations. (II-R. 302-305.) However, he received no salary or allowance for his work. (II-R. 104, 287, 468.)

Taxpayers' daughter, Dolores, lived in Winters with her husband and worked full time throughout 1956 as a clerk for Pacific Gas & Electric Company.

⁴ On January 28, 1958, Dolores Donaldson advised the District Director that the employer's return for 1956 should have been filed under the name and account number for "Joe R. Ramos & Co." However, that account number was not applied for until November of 1957 and was obtained for a partnership that did not include Mary Ramos as a partner. (Exs. 47, 49.)

(II-R. 98, 143, 159, 293-294.) As compensation for doing the bookkeeping for the partnership on a part-time basis, she received a salary of \$150 a month. (I-R. 20, 22.)

Taxpayers' son, Joe, was on military duty in Hawaii during 1956 with the exception of the last week in December. (II-R. 26, 288-289, 489.) During that brief stay at home, he did not do any work on the ranch. (II-R. 288.)

The 1956 almond crops was sold on June 26, 1956, by Joe R. Ramos as the seller. (II-R. 23; Ex. 54.)

For 1956, the partnership filed a federal partnership information return in the name of "Joe R. Ramos Co." (I-R. 38; Ex. 42.) This return was filed on the cash basis (Ex. 42) and reflected total receipts of \$220,640.68, of which \$70,640.48 represented proceeds from the almond crop grown on taxpayers' ranch and sold in 1955. (I-R. 67-68, 70; II-R. 469; Ex. 7, p. A.) The return further reflected expenses of \$68,477.04, including depreciation and real property taxes on assets belonging to taxpayer. The net income of \$152,163.44, as shown on the return, was divided into four equal shares of \$38,040.86, which shares were reported by the purported partners on their individual returns for 1956. (Exs. 43, 44, 45, 46.)

Dolores Donadson's distributive share of the partnership's profit for 1956 was paid to her on February 14, 1957. (I-R. 41; Ex. 14.) She then paid \$16,028.68 to the Internal Revenue Service in payment of her federal income taxes for 1956. (I-R. 42.) In addition, she paid \$1,160.34 to the Franchise Tax

Board of the State of California in payment of her 1956 state income tax. (I-R. 41.)

Payment of the distributive share of Joe S. Ramos, who was then in Hawaii, was handled as follows: \$17,472.56 was paid to the Internal Revenue Service from taxpayers' joint checking account for their son's 1956 federal income taxes and \$19,173.85 was deposited to a savings account maintained in the names of "Ramos, Joe S. or Joe R." in the form of a check drawn on taxpayers' joint account. (I-R. 41; II-R. 124.) Taxpayer then withdrew \$2,217.75 from the account he had with his son to pay state and additional federal income taxes for Joe S. Ramos for 1956. (I-R. 43.)

For 1957, a different partnership was purportedly organized to operate taxpayers' ranch. (II-R. 162-163.) A written agreement was entered into by taxpayer and his son and daughter which provided that they would engage in the farming business under the name of "Joe R. Ramos & Co." until January 1, 1962, and that each would receive $33\frac{1}{3}$ percent of the profits. Mary Ramos was not a party to this agreement and was not to be a partner in 1957. (Ex. 1.) The partnership agreement, in pertinent part, further provided (Ex. 1):

3. *Capital.* The capital of the partnership shall be contributed by the partners, in cash, as follows:

Joe R. Ramos	\$15,000.00
Dolores Donaldson	\$15,000.00
Joe S. Ramos	\$15,000.00

The foregoing capital consists entirely of cash and represents the entire assets of the partnership at the commencement of the calendar year 1957.

* * * *

5. *Salaries of Working Partners.* Joe R. Ramos shall devote full time and attention to the partnership business, and upon his release from military service, Joe S. Ramos will devote such time and attention to the partnership business as he is able. Doroles Donaldson shall render book-keeping services for the benefit of the partnership. And each of the partners shall receive such monthly salaries as may from time to time be fixed by mutual agreement between them, such salaries to be an allowance of reasonable compensation for services actually rendered to the partnership. Notwithstanding the foregoing, the amount of such salaries shall be subject to the provisions of paragraph hereof.

* * * *

7. *Drawing Accounts.* * * * Except as otherwise specifically provided herein, no part of the capital contribution of the partners shall be withdrawn without the unanimous consent of the partners.

8. *Management.* The partnership business shall be managed by the working partners, but in the event of any disagreement between them, the decision of Joe R. Ramos shall be controlling.

9. *Restrictions on Partners.* * * * No partner shall, except with the consent of the other partners, assign, mortgage or sell his share in the partnership or in its capital assets or property, or enter into any agreement as a result of which

any person shall become interested with him in the partnership, * * *. * * *

10. *Banking.* All funds of the partnership shall be deposited in its name in such checking account or accounts as shall be designated by the working partner or partners. All withdrawals therefrom are to be made upon checks signed by Joe R. Ramos.

As in 1956, the land, trees and improvements which made up taxpayers' ranch and the equipment necessary for its operations were not transferred to the partnership. (II-R. 20-21, 64; Ex. 1.) However, about the same time the 1957 partnership agreement was signed, a Memorandum of Rental Agreement was entered into by all partners on behalf of "Joe R. Ramos & Co." and by the taxpayers individually. (II-R. 70-71; Ex. 2.) This agreement provided (Ex. 2):

Joe R. Ramos & Company, a partnership will rent from Joe R. Ramos and Mary S. Ramos, for a two-year period commencing November 1, 1956 and terminating November 1, 1958, approximately 175 acres located near Winters and belonging to the owners. The rent to be paid to owners shall be 25% of the gross sale price of the crops raised thereon during the term and the partnership shall pay all expenses except real property taxes and machinery costs, said machinery to be supplied by owner, except that minor repairs to machinery for maintenance and less than \$100.00 shall be paid by the partnership.

Until the end of March, 1957, banking for the partnership was handled through taxpayers' joint account with the Bank of America at Winters. (II-R. 325, 329, 331-332; Exs. 6, pp. 17, 18 and 19, 61, 62.) At that time, taxpayer and his son and daughter each contributed \$15,000 to the partnership.⁵ These contributions were deposited to the account of "Joe R. Ramos & Co." which was opened at the First National Bank of Dixon. (I-R. 42; II-R. 46-47, 84-85; Ex. 10.) This account and a savings account subsequently opened in the same name could be drawn upon only by Joe R. Ramos or Mary Ramos. (II-R. 52, 91-92, 98, 167, 252; Ex. 5.)

The partnership books for 1957 were kept on the cash basis and in substantially the same form as the books kept for taxpayers in previous years. (I-R. 43; II-R. 320, 323; Ex. 6, pp. 1, 17-31.) A similar set of books was also kept for taxpayers in 1957. (Ex. 7, pp. B, C-I.)

For 1957, business was done mainly in the name of "Joe R. Ramos & Co." (II-R. 99.) A fictitious name certificate listing the purported partners was executed in July of that year and filed with the County

⁵ As was previously noted, the contributions of Dolores and Joe S. in 1957 were derived from the profits of the 1956 partnership. (II-R. 43-46, 49-50, 100, 173-176.) The actual mechanics of making these contributions involved the issuance of checks to the children from taxpayers' account with the Bank of America at Winters (I-R. 41), the depositing of these checks to accounts maintained by the children (I-R. 41-42), and the purchasing of cashier's checks for the funds actually deposited to the account opened in the name of "Joe R. Ramos & Co." with the First National Bank of Dixon. (I-R. 42).

Clerk of Solano County in Fairfield, California, but was not published until September in a local newspaper. (Exs. 3, 4.) The 1957 almond crop was sold under a contract made by "Joe R. Ramos & Co." as seller and payments were made in that name by the purchaser. (Exs. 55, 57, 58, 60.) The federal employer's withholding tax return was filed under the account number obtained for the 1957 partners (II-R. 197; Exs. 37, 49) and the workmen's compensation report for 1957 was also filed in the partnership name (Ex. 36).

Dolores Donaldson, in acting as bookkeeper for the 1957 partnership, did essentially the same work which she had done in prior years for taxpayers (II-R. 322-325) and was paid \$150 a month for her work (I-R. 20, 22). Taxpayers' son was not separated from the Navy until October of 1957 and worked on the ranch for only the last three months of the year. He received a salary of \$350 per month during this period. (I-R. 38; II-R. 443-444, 446-447; Ex. 24.)

For 1957, a federal partnership information return was filed on the cash basis (Ex. 33) in the name of "Joe R. Ramos & Co." This return reflected total receipts in the amount of \$194,206.45, including \$157,088.71 from almonds and other crops which were raised, sold and delivered in 1956. (II-R. 113-114, 361, 363; Ex. 6, p. 1; Ex. 7, p. B.) Rent to Joe R. Ramos in the amount of \$48,480.08⁶ and other ex-

⁶ The sum of \$48,480.08 was paid by partnership receipts of \$30,000 and \$7,239.41 which taxpayer withheld as advance rent (Ex. 7, p. B) and a check for \$11,240.67 which was

penses of \$43,044.58 were deducted from the total receipts to arrive at a net income of \$102,681.79 for the year.

Dolores Donaldson and Joe S. Ramos each reported \$34,227.25, or one-third of the partnership net income, on their individual federal income tax returns for 1957. (Exs. 18, 24.) Taxpayers reported the remaining one-third of the net income and rent in the amount of \$48,480.08 on their 1957 federal income tax return. (Ex. 32.)

On February 6, 1958, Dolores Donaldson and Joe S. Ramos each received \$15,000 as a partial distribution of the profit reported by the partnership for 1957. (Exs. 26, 27, 30.) No other payments were made to either of them for the remainder of their 1957 distributive shares. (II-R. 350-351, 353.)

On February 10, 1958, Dolores Donaldson and her husband paid a total of \$14,622.98 for 1957 federal and state income taxes due in addition to the taxes withheld from their salaries. (Exs. 18, 28, 29.) On the same day, Joe S. Ramos and his wife paid 1957 federal and state income taxes totaling \$12,343.30. (Exs. 24, 65.)

The Internal Revenue Service audited the individual returns filed by taxpayers for the years 1956 and

drawn by the partnership in 1958 (II-R. 551-552). It should also be noted that the sum of \$48,480.08 was approximately 25 percent of the gross crop receipts received in 1957 and was determined without regard to the period in which the crops were grown, whereas the rental agreement purportedly in effect for 1957 provided for only 25 percent of the gross receipts for crops grown on the premises after November 1, 1956. (Ex. 2.)

1957 and determined that no valid "family partnership" existed in either year for federal income tax purposes. Additional income taxes and interest were therefore assessed against and paid by taxpayers for the years and in the amounts now in suit. (I-R. 39-40.) Corresponding refunds were made to taxpayers' son and daughter and their respective spouses for taxes which they had paid on the partnership income. (II-R. 405-406; Exs. 72, 75, 78, 79, 80.)

After their refund claims were rejected by the District Director of Internal Revenue at San Francisco, taxpayers filed the instant suits. (I-R. 39, 40-41.)

The cases were consolidated for trial and tried to the District Court sitting without a jury. The District Court held (I-R. 53) that a valid family partnership existed during 1956 composed of taxpayers and their children and during 1957 composed of taxpayer Joe R. Ramos and the children. And the District Court determined the "corrected" partnership income and the distributive shares of the partners on the basis of various adjustments, including the allowance of 25 percent of the crop receipts as rent owing to taxpayers by the partnership for the taxable years and the allocations in equal amounts among members of the 1956 partnership of the sum of \$157,088 received in 1957 from crops sold in 1956. (I-R. 70-74.)

The Government appeals to this Court and its specification of errors relied upon as grounds for reversal are stated below.

SPECIFICATION OF ERRORS RELIED UPON

1. The District Court erred in finding and concluding that, during the year 1956, a valid family partnership composed of taxpayers and their children, Dolores Donaldson and Joe S. Ramos, existed and operated the Ramos Home Ranch.

2. The District Court erred in finding and concluding that, during the year 1957, a valid family partnership composed of taxpayer Joe R. Ramos and his children, Dolores Donaldson and Joe S. Ramos, existed and operated the Ramos Home Ranch.

3. In the alternative, and assuming that a valid family partnership existed during the year 1956, the District Court erred in allocating only 25 percent of the partnership's crop receipts for 1956 to taxpayers for the use by the partnership of the land, trees and equipment which made up the Ramos Home Ranch and which were owned by taxpayers.

4. In the alternative, and assuming that a valid family partnership existed during the year 1956, the District Court erred in allocating in equal amounts among members of the 1956 partnership, the sum of \$157,088.71 received in 1957 from crops sold in 1956.

5. In the alternative, and assuming that a valid family partnership existed during the year 1957, the District Court erred in recognizing the rental agreement between taxpayers and the partnership in determining the amount allocable to taxpayers for the use during the year 1957 by the partnership of the land, trees and equipment which made up the Ramos Home Ranch and which were owned by taxpayers.

SUMMARY OF ARGUMENT

The resolution of the problems as presented by the family partnership situation involves two basic principles of taxation: (1) that the assignment of the right to receive future income, whether from personal services or from property, will not shift the burden of taxation of such income, when realized, from the assignor to the assignee and, (2) on the other hand, that a completed gift of income-producing property will effectively shift the tax incidence of the income thereafter derived from such property to the donee.

The record evidence is quite clear that in spite of the Supreme Court's requirement in *Commissioner v. Culbertson*, 337 U.S. 733, that there be a present contribution of either capital or services, taxpayers, in their attempt to show the validity of their family partnership, have established little more than a desire to commence operating as a family partnership in 1956. The evidence shows that in 1956 the ownership of the land, trees and improvements, which comprised taxpayer's ranch and the equipment necessary for its operation was retained by taxpayers; that all banking was done through taxpayers' joint checking account; that the bookkeeping practices remained the same and separate partnership accounts were not maintained; that the ranch was operated in taxpayer's name; and that taxpayer supervised and managed the ranch full-time. Moreover, neither of the children contributed any capital to the purported partnership; taxpayers' son was absent from the ranch because of military service even before the

partnership was to commence operating; and taxpayers' daughter merely continued her part-time bookkeeping duties and was paid therefor.

A new partnership was entered into in 1957 in which Mary Ramos was no longer a partner. Taxpayer continued as manager of the partnership and, for at least the first nine months of that year, was the only partner to render any substantial service in the production of partnership income. The land, trees and equipment which comprised the ranch remained taxpayers' property. Notwithstanding execution of a partnership agreement at the beginning of the year, no changes were made in the banking or the bookkeeping for the ranch until the end of March, and even then the partnership bank accounts could be drawn upon only by taxpayer and Mary Ramos, who was no longer a partner. Taxpayers' son worked only at the very end of the harvest and was paid for his work. Taxpayers' daughter continued to do the bookkeeping on a part-time basis and was paid therefor. The fact that there was a written partnership and rental agreement, that the name "Joe R. Ramos & Co." was used, and that each of the children allegedly contributed \$15,000 as capital (which they received as part of their distributive share of the 1956 partnership *profits*) did not make any real difference in the operation of taxpayers' ranch for 1957.

Although the children rendered some service to the partnership, still, they were paid therefor and they contributed as partners nothing which was of benefit to or furthered the legitimate business purposes of the partnership. Hence, they should not be recog-

nized as partners; and taxpayers' attempt to use their family to minimize their tax burden must be recognized as being merely an attempt to assign future income while retaining ownership of the income-producing assets. In failing to recognize that there was involved an attempt to assign income and in upholding the validity of the partnership, the District Court committed a reversible error.

Having upheld the validity of the family partnerships, the District Court erred in allocating to taxpayers, as owners of all the operating assets used by the partnership, only 25 percent of the crop income for 1956; in allocating equally among the 1956 partners the sum of \$157,088.71 which was received in 1957 from the sale of 1956 crops; and in recognizing the rental agreement for 1957, in that, by so doing, the court failed to uphold the basic tenet of income taxation that income from property is taxable to the person who owns or controls the property and failed to allocate the partnership income as required by Section 704(e) of the Internal Revenue Code of 1954.

ARGUMENT

I

The District Court Erred in Holding That There Was a Valid Family Partnership Composed of Taxpayers and Their Children During 1956 and a Valid Family Partnership Composed of Taxpayer Joe R. Ramos and the Children During 1957

This case represents but another phase in the history of income tax litigation which reflects the continuing effort on the part of taxpayers, by the use of an alleged family partnership, to distribute the im-

pact of taxation among members of a close family group without altering control over the income-producing property, and the attempts of the Commissioner to insure that income from property will be taxable to the substantial owner of the property and that income from personal services will be taxable to the person rendering those services. See *Toor v. Westover*, 200 F. 2d 713 (C.A. 9th).

The resolution of the problems as presented by the family partnership situation involves two basic principles of taxation: (1) that the assignment of the right to receive future income, whether from personal service (*Lucas v. Earl*, 281 U.S. 111) or from property (*Helvering v. Horst*, 311 U.S. 112), will not shift the burden of taxation of such income, when realized, from the assignor to the assignee (*Sellers v. Commissioner*, 218 F. 2d 380 (C.A. 9th)) and (2) on the other hand, that a completed gift of income-producing property will effectively shift the tax incidence of the income thereafter derived from such property to the donee. Section 704(e) of the Internal Revenue Code of 1954 (Appendix A, *infra*).

The basic test for the recognition of a partnership for tax purposes is the existence of a bona fide intent on the part of the purported partners to carry on business together and to share profits and losses. In the case of a family partnership, however, it has long been recognized that the existence of the requisite intent is subject to close scrutiny because of the great temptation to secure income-splitting advantages without conducting the business as a true partnership, with all the members thereof possessing the

attributes of true partners as is the case of a partnership established and operated by unrelated persons. 6 Mertens, Law of Federal Income Taxation, Section 35.08.

The Supreme Court, in clarifying the principles developed in this area of law by *Commissioner v. Tower*, 327 U.S. 280, and *Lusthaus v. Commissioner*, 327 U.S. 293, decided *Commissioner v. Culbertson*, 337 U.S. 733. In *Culbertson v. Commissioner*, decided June 24, 1947 (6 T.C.M. 692), the Tax Court had interpreted the Supreme Court's decision in *Commissioner v. Tower*, *supra*, and *Lusthaus v. Commissioner*, *supra*, as setting out two essential tests of partnerships for income tax purposes: that each partner contributes to the partnership either vital services or capital originating with him. The Fifth Circuit, on the other hand, believed that a family partnership entered into without thought of tax avoidance should be given recognition tax-wise whether or not it was intended that some of the partners contribute either capital or services during the tax year and whether or not they actually made such contribution. *Culbertson v. Commissioner*, 168 F.2d 979 (C.A. 5th). The Supreme Court was then faced with the question as to whether "an intention to contribute capital or services sometime in the future is sufficient to satisfy ordinary concepts of partnership, as required by the *Tower* case." *Commissioner v. Culbertson*, *supra*, pp. 738-739.⁷ In answer to the question before it, the Court stated (pp. 739-740):

⁷ All future references to the *Culbertson* case will be to the decision of the Supreme Court unless otherwise noted.

If it is conceded that some of the partners contributed neither capital nor services to the partnership during the tax years in question, as the Court of Appeals was apparently willing to do in the present case, it can hardly be contended that they are in any way responsible for the production of income during those years. [Footnote omitted.] The partnership sections of the Code are, of course, geared to the sections relating to taxation of individual income, since no tax is imposed upon partnership income as such. To hold that "Individuals carrying on business in partnership" includes persons who contribute nothing during the tax period would violate the first principle of income taxation: that income must be taxed to him who earns it. *Lucas v. Earl*, 281 U.S. 111 (1930); *Helvering v. Clifford*, 309 U.S. 331 (1940); *National Carbide Corp. v. Commissioner*, 336 U.S. 422 (1949).

* * * A partnership is, in other words, an organization for the production of income to which each partner contributes one or both of the ingredients of income—capital or services. *Ward v. Thompson*, 22 How. 330, 334 (1859). The intent to provide money, goods, labor or skill sometime in the future cannot meet the demands of §§ 11 and 22(a) of the Code that he who presently earns the income through his own labor and skill and the utilization of his own capital be taxed therefor. The vagaries of human experience preclude reliance upon even good faith intent as to future conduct as a basis for the present taxation of income. [Footnote omitted.]

The Supreme Court, although requiring a partner to contribute either capital or services during the tax

year, rejected the Tax Court's requirement that the services be "vital" or the capital be "original". *Id.*, p. 741. In laying out the principles which were to serve as the guidelines by which courts were to determine whether or not a family partnership was to be recognized as valid, the Court stated (p. 742):

The question is not whether the services or capital contributed by a partner are of sufficient importance to meet some objective standard supposedly established by the *Tower* case, but whether, considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent—the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise. [Footnote omitted.]

Subsequent to the Court's decision in *Culbertson*, the Revenue Act of 1951 was enacted, at which time Congress added to Section 3797(a) of the 1939 Code ⁸ a

⁸ SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * *

(2) [as amended by Sec. 340(a), Revenue Act of 1951, c. 521, 65 Stat. 452] *Partnership and Partner*.—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any

sentence providing that a person shall be recognized as a partner for income tax purposes if he owns a capital interest in a partnership in which capital is a material income-producing factor, whether or not such interest was derived by purchase or gift from any other person. At the same time Congress added Section 191 to the Internal Revenue Code of 1939.⁹

business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization. A person shall be recognized as a partner for income tax purposes if he owns a capital interest in a partnership in which capital is a material income-producing factor, whether or not such interest was derived by purchase or gift from any other person.

* * * *

(26 U.S.C. 1952 ed., Sec. 3797.)

⁹ SEC. 191 [as added by Sec. 340(b), Revenue Act of 1951, *supra*]. FAMILY PARTNERSHIPS.

In the case of any partnership interest created by gift, the distributive share of the donee under the partnership agreement shall be includible in his gross income, except to the extent that such share is determined without allowance of reasonable compensation for services rendered to the partnership by the donor, and except to the extent that the portion of such share attributable to donated capital is proportionately greater than the share of the donor attributable to the donor's capital. The distributive share of a partner in the earnings of the partnership shall not be diminished because of absence due to military service. For the purpose of this section, an interest purchased by one member of a family from another shall be considered to be created by gift from the seller, and the fair market value of the purchased interest shall be con-

That section provided that in the case of a partnership interest created by gift, the distributive share of the donee under the partnership agreement was to be included in his gross income except to the extent that such share was determined without allowing reasonable compensation for services rendered by the donor and a proportionate return to the donor on his capital.¹⁰ The reports of the congressional committees emphasized that partnership income should be taxed to the real owner of the partnership interest. *Spiesman v. Commissioner*, 260 F. 2d 940 (C.A. 9th); *Toor v. Westover*, *supra*. The Report of the House Ways and Means Committee (H. Rep. No. 586, 82d Cong., 1st Sess., p. 33 (1951-52 Cum. Bull. 357, 380), stated:

Section 312 of your committee's bill is intended to harmonize the rules governing interests in the so-called family partnership with those generally applicable to other forms of property or business. Two principles governing attribution of income have long been accepted as basic: (1) income from property is attributable to the owner of the property; (2) income from personal

sidered to be donated capital. The 'family' of any individual shall include only his spouse, ancestors, and lineal descendants, and any trust for the primary benefit of such persons.

(26 U.S.C. 1952 ed., Sec. 191.)

¹⁰ Both of the above-mentioned additions to the 1939 Internal Revenue Code are now contained in Section 704(e) of the Internal Revenue Code of 1954.

services is attributable to the person rendering the services.¹¹

For the identical language see also S. Rep. No. 781, 82d Cong., 1st Sess. p. 39 (1951-2 Cum. Bull. 458, 486).

In the instant proceeding, the Government contends, for the reasons stated below, that the District Court erred in holding that there was a valid family partnership composed of taxpayers and their two children in 1956 and a valid family partnership composed of taxpayer Joe R. Ramos and the two children in 1957, and in failing to hold that there was a mere assignment of future income from property and services of taxpayers. The Government further con-

¹¹ The enactment of the family partnership provisions noted above was not intended to legitimize all family partnerships. *Spiesman v. Commissioner*, *supra*, p. 948; *Kuney v. Frank*, 308 F. 2d 719, 720 (C.A. 9th). The purpose of the amendments in 1951 was to insure that the income properly attributable to a capital interest in a partnership acquired as a gift would be taxed to the donee if he were the real owner of such interest regardless of the motive prompting the transfer to him. See 6 Mertens, *Law of Federal Income Taxation*, Sec. 35.10. As stated in H. Rep. No. 586, *supra*, p. 33 (1951-2 Cum. Bull., p. 381):

The amendment leaves the Commissioner and the courts free to inquire in any case whether the donee or purchaser actually owns the interest in the partnership which the transferor purports to have given or sold him. Cases will arise where the gift or sale is a mere sham. Other cases will arise where the transferor retains so many of the incidents of ownership that he will continue to be recognized as a substantial owner of the interest which he purports to have given away, as was held by the Supreme Court in an analogous trust situation involved in the case of *Helvering v. Clifford* (309 U.S. 351).

tends that in its attempt to apply the principles of the *Culbertson* case to the instant situation, the District Court extended the doctrine of that case beyond all reasonable bounds.

The District Court, in its reliance on *Culbertson*, has placed emphasis of the intention of taxpayers to form a family partnership with their children¹² and has failed to take cognizance of the Supreme Court's requirement in *Culbertson* that there be a present contribution of capital and/or services by the partners—that reliance upon good faith intent to contribute capital or services in the future is not sufficient to validate a partnership in the present. The reasoning of the District Court here is premised on the very fallacy which was contained in the Fifth Circuit's reasoning in *Culbertson* and which led to the remand of *Culbertson* for a determination as to which of the purported partners “was there a bona fide intent that they be partners in the conduct of the cattle business, either *because of services* to be performed during those years, or because of *contributions of capital* of which they were the true owners * * *”.

¹² As disclosed by the opinion in these cases (I-R. 57-59), the District Court looked for the “true intention” of the family members much as it would have looked for a meeting of the minds to form a contract and, having found that the Ramos family in good faith had expressed the intention to form and believed that they had formed a partnership, simply terminated all further consideration of the factors determinative of the basic partnership issue. The statements of the parties as to their intention to form a partnership are unquestionably entitled to consideration, but the finding that these statements were made in good faith and expressed a “true intention” is not the end of the inquiry.

Commissioner v. Culbertson, *supra*, p. 748. (Emphasis supplied.)

The record evidence is quite clear that in spite of the *Culbertson* requirement that there be a present contribution of either capital or services, taxpayers, in their attempt to show the validity of their family partnership, have established little more than a desire to commence operating as a family partnership in 1956. The uncontroverted evidence shows that in 1956 the land, trees and improvements which comprised taxpayers' ranch and the equipment necessary for its operation were retained by taxpayers (II-R. 20-21, 155-156, 483-484); that all banking was done through taxpayers' joint checking account (II-R. 120-121, 238-239; Ex. 6); that the bookkeeping practices remained the same and separate partnership accounts were not maintained (I-R. 64); that the ranch was operated in taxpayer's name (II-R. 99; Ex. 35); and that taxpayer supervised and managed the ranch full-time (II-R. 302-305). On the other hand, neither of the children contributed any capital to the purported partnership (II-R. 20, 301-302); taxpayers' son was absent from the ranch because of military service even before the partnership was to commence operation (II-R. 18, 153, 161, 427, 429-430, 483); and taxpayers' daughter merely continued her part-time bookkeeping duties and was paid therefor (II-R. 188, 287). With the exception of the filing of a partnership return after the year ended (Ex. 42), the ranch was operated in 1956 exactly as it had been in prior years. There was no change of hands. Cf. *Haas v. Commissioner*, 248 F. 2d 487, 489 (C.A. 2d).

The District Court's reliance (I-R. 61) on Section 704(e) (2) of the Code and on *Culbertson* to excuse the failure of Joe S. Ramos to perform any services on the ranch for the partnership during 1956 because of his being in the Navy is misplaced. As stated by the Supreme Court in *Commissioner v. Culbertson*, *supra*, p. 739:

Of course one who has been a bona fide partner does not lose that status when he is called into military or government service, and the Commissioner has not so contended. On the other hand, one hardly becomes a partner in the conventional sense merely because he might have done so had he not been called.

Here, Joe S. Ramos went into the service in November of 1955, while the partnership was not to commence its operations until January of 1956. All the purported partners knew he was going into the service and would be unable to contribute any service to the partnership once it commenced its operation. (II-R. 157-158.) Indeed, it was even understood that taxpayer was going to do his son's share of the work until he returned from military duty. (I-R. 61; II-R. 464-465.) Under these circumstances, where his only contribution was to be his services, the inability of Joe S. Ramos to render any service during the year prevents the finding of any intent to join with taxpayer as a partner.¹³ *Sellers v. Commissioner*, *supra*;

¹³ The District Court's intimation that Joe S. Ramos performed services for the partnership during his military tour in Hawaii (I-R. 61) is without foundation. It would be difficult to imagine any other business than a farm in which

Harkness v. Commissioner, 193 F. 2d 655 (C.A. 9th), certiorari denied, 343 U.S. 945; *Ritter v. Commissioner*, 174 F. 2d 377 (C.A. 4th). As was stated by the Court of Claims in *Cain v. United States*, 135 F. Supp. 516, certiorari denied, 352 U.S. 890, a case analogous to this case (pp. 519-520):

In the instant case the plaintiff's son, Dr. Charles C. Cain, worked for his father's firm on a salary from early August until he was called into the service on December 5, 1942. At the time of signing the agreement some time after September 1, 1942, he and his father had full knowledge that he was to be called into the service; in fact, he had received a commission as probationary ensign while still in dental school prior to the signing of the agreement and was commissioned a lieutenant (jg) in the Navy on October 30, 1942. Both father and son knew that he would be called into the service. The agreement by its terms was to be effective January 1, 1943. Both plaintiff and his son knew that he would not be able to make any contribution to the partnership as such until after his return from the service. The father took pains by the terms of the agreement to provide that should the son die during his period of service all of the equipment, all of the property of the partnership should immediately revert to plaintiff.

actual physical presence would be more necessary if Joe S. Ramos were to render income-producing services. Moreover, it is apparent from the record that taxpayer was able to and did manage the ranch without instructions from his son. (II-R. 302-305.) After all, taxpayer had farmed on his own since 1932. (I-R. 56.)

We do not believe the facts justify a division of the profits of the firm during the period of the son's service.

We have no doubt that the father had all along planned from the date of Charles' birth for him ultimately to become a member of the firm. We have no doubt that the young man from the day he reached the years of discretion probably had the same intention.

We find notwithstanding the effective date recited in the agreement it remained executory until Charles C. Cain returned from the service in October 1944.¹⁴

Nor does Section 704(e) (2) of the 1954 Internal Revenue Code lend credence to the District Court's

¹⁴ The District Court attempted to distinguish *Cain v. United States* from this case on three grounds (I-R. 62): First, that the son had received his Naval commission prior to the signing of the partnership agreement; second, that should Cain's son have died in the service, all property of the partnership would have reverted immediately to the father; and third, that the Cain partnership was to be of a strictly personal service character. These distinctions are, however, groundless. First, all members of the Ramos family knew before the time when the partnership was to commence its operation that Joe S. Ramos was going in the service before the start of the partnership. Second, unlike the son in the Cain case, Joe S. Ramos did not even purport to own any partnership assets as Joe R. Ramos contributed none of the income-producing assets to the partnership, but retained ownership and control thereof in his wife and himself. Therefor, there was no need to agree as to the disposition of such assets should Joe S. Ramos have died while in the service. Third, although the Ramos partnership was one where capital was a material income-producing factor, the only contribution Joe S. Ramos was to make was to be his services. Thus, he was in no better position to make a contribution to the partnership while in the service than was the son in the *Cain* case.

decision that Joe S. Ramos was entitled to a distributive share of the partnership profits. Section 704(e) (2), in providing that "The distributive share of a partner in the earnings of the partnership shall not be diminished because of absence due to military service", is not concerned with the determination of the status of a family member as a partner in a family partnership. Rather, that provision is concerned only with the computation of a partner's distributive share and is applicable only when a party who is a bona fide partner is absent due to military service. Thus, although a person may remain a partner while on military duty, the mere fact that he is in the service does not make him a partner.

Moreover, the possible application of Section 704(e) to the 1956 partnership is eliminated by taxpayers' failure to transfer any of the income-producing capital to their children. As stated by taxpayer's daughter, the partnership was to be only in the "profits or losses that would be produced by the almond trees on the land." (II-R. 302.) The mere right to participate in the earnings and profits of a partnership is not a capital interest in the partnership. Treasury Regulations on Income Tax (1954 Code), Section 1.704-1 (e) (1) (v) (Appendix A, *infra*).

As for the services performed by Dolores Donaldson, the record shows that these services consisted mainly of part-time bookkeeping¹⁵—a job which she

¹⁵ As recognized by the District Court, the ranch was not a complex business organization requiring detailed accounting records and control to operate. (I-R. 64.)

had performed from the time she was in high school (I-R. 56), a job which she was able to perform even though she was employed full-time elsewhere (II-R. 98, 143, 159, 293-294), and a job for which she was compensated by the partnership (I-R. 20, 22; II-R. 287). When it is noted that taxpayer received no remuneration at all for the service which he performed on the ranch (I-R. 69), and when it is noted that taxpayer's accountant testified that the bookkeeping could have been performed by an outsider for as little as \$100 or \$150 a month (II-R. 520-521) and that in fact someone else must have performed the work between 1943 and 1951, when Dolores started doing it, it becomes apparent that these services are not those of a partner and do not entitle her to recognition as a partner. See *Niederkrome v. Commissioner*, 266 F. 2d 238, 244 (C.A. 9th).

The only other evidence of participation by the children in the 1956 partnership is the fact that their distributive shares of the reported income were paid out to them.¹⁶ However, the bulk of this income was used by taxpayers' children to pay federal and state income taxes (I-R. 38-39, 41-42) (which, for the most part, were attributable to their partnership income) and to make their alleged contributions to the 1957 partnership (Exs. 17, 21) (which contributions went into a bank account subject to the control of taxpayers

¹⁶ The testimony of witnesses Lopez, Huff, Molina and Silvey, who had not done business with the purported partnership, was concerned only with the mental intention of the Ramos family to form a partnership and the family's belief that they had succeeded. (II-R. 367-390.)

solely (I-R. 41-42)). Such "withdrawals" of income do not evidence the participation necessary for recognition of the children as partners.¹⁷ *Giffen v. Commissioner*, 190 F. 2d 188, 190 (C.A. 9th), certiorari denied, 342 U.S. 918; *Sellers v. Commissioner*, *supra*, p. 383; *Pogetto v. United States*, 306 F. 2d 76 (C.A. 9th).

As the children "contributed nothing which was of benefit to or furthered the legitimate business purposes of said partnership or the other members thereof", they should not be recognized as partners. *Pogetto v. United States*, *supra*, p. 80. And, "the attempt to use this intimate family group * * * in order to minimize a just tax burden" on taxpayers' farming business must fail. *Giffen v. Commissioner*, *supra*, p. 190. Therefore, the holding of the District Court that a valid family partnership composed of taxpayers and their two children was in existence and conducted and operated the Ramos ranch during 1956 (I-R. 53) is erroneous and should be reversed.

¹⁷ There is absolutely no support for the District Court's statement that "The partnership distributive shares were received and used and controlled by the partners with complete independence and have continued ever since to be so received, used and controlled" (I-R. 65) insofar as taxpayers' children are concerned. It is clear from the record evidence, as noted above, that practically all of the children's distributive shares for 1956 went to pay their income taxes and to make their 1957 capital contributions; that the son's distributive share was run through a joint account which could be and was drawn on by the father; that with regard to the 1957 partnership the distributive shares were paid out in amounts only slightly greater than the children's income taxes for 1957; and that the balance of the distributive shares for 1957 was not paid out. (II-R. 181-182, 351; Exs. 26, 27, 65.)

Although the Ramos family entered into a new arrangement for the operation of taxpayers' ranch during 1957 in which Mary Ramos was no longer a partner (I-R. 65), the partnership purportedly organized for that year is subject to most of the infirmities discussed with reference to the partnership for 1956.

Taxpayer continued as manager of the partnership in 1957 and, for at least the first nine months of that year, was the only partner to render any substantial service in the production of partnership income. The land, trees and equipment which comprised the ranch remained taxpayers' property. (II-R. 20-21, 64; Ex. 1.) Notwithstanding execution of a partnership agreement at the beginning of the year, no changes were made in the banking or the bookkeeping for the ranch until the end of March (II-R. 325, 329, 331-332), and even then the partnership bank accounts could be drawn upon only by taxpayer or Mary Ramos, who was not even a partner (II-R. 52, 91-92, 167). Joe S. Ramos worked only at the very end of the 1957 harvest (and was paid for his services) (I-R. 38, II-R. 443-444, 446-447), Dolores Donaldson continued to do essentially the same bookkeeping which she had done in prior years (II-R. 322-325), and both children received profit distributions which only slightly exceeded the taxes on their allocable shares of the 1957 partnership income.¹⁸

¹⁸ Dolores Donaldson and Joe S. Ramos each recieved a part payment of \$15,000 on their distributive share of the 1957 partnership profit. (Exs. 26, 27.) Dolores paid therefrom federal and state income taxes in the amount of \$14,622.98 (II-R. 181-182) and Joe S. paid therefrom federal and state

To support its decision that there was a valid partnership in 1957, the District Court relied, in part, upon the factors that there was a formalization of the partnership agreement, that a rental agreement covering part of the ranch was entered into, that the name "Joe R. Ramos & Co." was used in doing business, and that each of taxpayers' children contributed \$15,000 as capital. (I-R. 65-66). The record, however, demonstrates that none of these things made any real difference in the operation of taxpayers' ranch in 1957.

Formalization of the 1957 partnership was undertaken at the suggestion of taxpayers' tax accountant principally to "firm up" the arrangement which the Ramos family believed they had created in the prior year. (II-R. 487.) However, as the 1956 partnership should not be entitled to recognition as a valid partnership for federal income tax purposes, the execution of the partnership agreement and the rental agreement add nothing to the validity of the 1957 partnership unless the agreements actually resulted in a change in the economic relationship of the parties. *Kuney v. Frank, supra.*

Upon examination of the partnership agreement (Ex. 1), it is clear that the provisions concerning the operation of the ranch serve merely to emphasize taxpayer's absolute control and that any restrictions imposed thereon were merely illusory. Although taxpayers' children were purportedly equal partners and

income taxes of \$12,343.30 (Ex. 65). The balance of their distributive shares was left in the partnership account. (II-R. 351.)

together owned two-thirds of the partnership, taxpayer's management decisions were to be controlling in the event of any disagreement and he was to have exclusive control over the partnership's bank accounts.¹⁹ The provisions of the agreement restricting the rights of all partners (including taxpayer) to withdraw their capital or transfer their interests did not affect the essential income-producing assets of the ranch as taxpayers retained ownership thereof. (Ex. 2.) Finally, the one provision of the agreement which attempted to make a realistic allocation of partnership income on the basis of services actually rendered was not followed with regard to taxpayer who actually ran the ranch during 1957 and was not compensated therefor. (I-R. 69.)

With respect to the rental agreement (Ex. 2), the record reflects that it was not followed in making the 1957 rent computation and apparently it did not express the understanding of at least one of the partners (II-R. 362-363). Furthermore, as the partnership-lessee was managed by one of the taxpayer-lessors under the partnership agreement, it is difficult to attribute any real change in the economic relationship of the parties upon execution of the lease.

Nor does the fact that the business may have been conducted in the name of "Joe R. Ramos & Co." for

¹⁹ The actual exercise of this control is well illustrated by taxpayer's retention of partnership receipts of \$37,239.41 as advance rent without the knowledge or prior consent of his daughter (II-R. 280-281), apparently without his son's ever learning about it (II-R. 474), and in spite of the fact that the rental agreement made no provisions for such advances.

most of 1957 result in any real change here, for there is practically nothing in the record to show that anyone doing business with "Joe R. Ramos & Co." knew or relied upon the fact that it was supposed to be a partnership. While a fictitious name certificate was completed by the partners in July of 1957, it was not published until September of that year (Exs. 3, 4), and even then the sale of the 1957 almond crop was made by "Joe R. Ramos & Co." from "his ranch." (Ex. 55). The only evidence that anyone dealing with "Joe R. Ramos & Co." actually knew before the end of 1957 that it was supposed to be a partnership composed of taxpayer and his children seems to be a self-serving application for an employer's account number which was made in November. (Ex. 49.)

Finally, as for the \$15,000 contributed by each of the children in 1957, the record reflects that it was neither needed nor utilized during the year and that it added nothing to the operation of taxpayers' ranch which was not already available. Even taxpayer himself would not say that the children's contributions were needed during 1957 (II-R. 126-127), and the record bears out his reluctance to so testify. For example, taxpayer withdrew over \$30,000 as "advance rent" less than a month before the children contributed a like amount as capital (Ex. 7, p. B), the checking account which was opened with their contribution and a \$15,000 contribution by taxpayer never fell below \$40,000 (Ex. 8), and approximately \$70,000 in other partnership receipts was placed in a savings account and left untouched for the remainder of the

year (Ex. 6, p. 1). When it is remembered that the children's purported capital contribution was derived from the profits of the 1956 partnership, was originally paid out of taxpayers' joint bank account, and was finally deposited in another bank account which taxpayers alone could draw upon, it appears that the only purpose for taxpayers' children to make the contribution was to create the impression of new capital being invested by the children. Indeed, there is no other reasonable explanation for the circuitous procedure followed in making the contributions.²⁰ Moreover, the record does not indicate that either of the children had funds sufficient to make the contributions called for by the partnership agreement when it was signed. Accordingly, the Government contends that the 1957 partnership should be held invalid for the same reasons that were put forth with regard to the 1956 partnership.

The issue as to whether a family partnership is real or fictitious has been before this Court on numerous occasions²¹ and in one of these many cases, this Court used language which appears to be decisive of the issue presented here. Thus, in *Kuney v. Frank*, *supra*, this Court stated (p. 720):

The courts have said, almost ad nauseam, and in various ways, that the income tax relates to reali-

²⁰ See footnote 5, *supra*.

²¹ See, for example, *Giffen v. Commissioner*, *supra*; *Harkness v. Commissioner*, *supra*; *Kuney v. Frank*, *supra*; *Niederkrone v. Commissioner*, *supra*; *Pogetto v. United States*, *supra*; *Sellers v. Commissioner*, *supra*; *Spiesman v. Commissioner*, *supra*; *Wisdom v. United States*, 205 F. 2d 30.

ties, so that "By the simple expedient of drawing up papers, single tax earnings cannot be divided into two tax units and surtaxes cannot be thus avoided." (*Commissioner v. Tower*, 1946, 327 U.S. 280, 291, 66 S. Ct. 532, 538, 90 L. Ed. 670). This is but another way of stating the principle, announced in *Helvering v. Horst*, 1942, 311 U.S. 112, 119, 61 S. Ct. 144, 148, 85 L. Ed. 75, that "The dominant purpose of the revenue laws is the taxation of income to those who earn or otherwise create the right to receive it and enjoy the benefit of it when paid." The principle has been repeatedly applied and one of its corollaries is that actual retention of the control of income and assets that produce it results in taxation of that income to him who retains the control.

Yet taxpayers persist in creating paper concepts, "for tax purposes," and then going about their business as if the concepts did not exist.

* * *

Taxpayer's attempt in the instant proceeding to shift the incidence of taxation over to his children without transferring to them any of the income-producing property or in any manner reducing his control thereover is blatant. Here, one need not wade through a maze of paper transactions in order to determine who was the owner of all of the operating assets used by the partnership, for the parties agree and the District Court found that the land, trees and equipment were all retained by taxpayer. (I-R. 63.) That taxpayer's purported establishment of a family partnership was merely an attempt to assign income is evident from the following testimony of his daughter (I-R. 64; II-R. 301-302):

Q. Well, what was your twenty-five percent interest in 1956?

A. In the partnership agreement. When we formed it we were going to be partners, were going to be a family partnership, all together, and whatever income we made we would share.

If we had losses, we would share them and we would pay our expenses, and whatever was left we would share twenty-five percent, my father, my mother, my brother and I. I don't think you have to own land to have a share in anything.

Q. In other words, you feel you can participate in the profits from the land without owning any portion of the land?

A. Yes.

Q. And this is the type of partnership interest you had, *just in the profits generated by assets?*

A. Profit or losses that would be produced by the almond trees on the land. (Emphasis supplied.)

Although one may avoid paying income taxes on the future income from his property by the remedy of giving the property away, taxpayers did not choose to do so. Having retained ownership of their property, taxpayers must now bear the burden of paying the tax on the income generated therefrom. To hold otherwise would be to allow taxpayers "to build up an estate in the children at the expense of the United States" (*Smith v. Westover*, 237 F. 2d 201, 203 (C.A. 9th)) and would be contrary to the decisions of the Supreme Court in *Lucas v. Earl*, *supra*, and *Helvering v. Horst*, *supra*, that the assignment of the right to receive future income will not shift the burden of taxation of such income, when realized, from the

assignor to the assignee. In addition, to allow the decision of the District Court to stand would be to sanction an unwarranted extension of the principles espoused by the Supreme Court in *Commissioner v. Culbertson, supra*.

Moreover, although the determination as to the validity of a family partnership is ordinarily a question of fact (*Commissioner v. Culbertson, supra*), the record evidence herein does not support the finding of the District Court that there were valid family partnerships in 1956 and 1957 and, therefore, this factual conclusion of the court is clearly erroneous and should be reversed by this Court on appeal (*Commissioner v. Duberstein*, 363 U.S. 278).

II

Assuming Arguendo That Valid Family Partnerships Existed During 1956 and 1957, the Income Thereof Must Be Reallocated in Order to Credit Taxpayers With a Reasonable Return on Their Capital

Having found a valid family partnership for 1956 and a valid family partnership for 1957, the District Court then had to consider what adjustments were to be made in order to establish the correct partnership income for each year and the manner in which the income was to be allocated among the partners. (I-R. 67.)

One phase of the problem which confronted the court was caused by the fact that the partnership for 1956 reported as part of its gross income the sum of \$70,640.48 received for almonds which were raised on taxpayers' ranch and were sold in 1955, before the

partnership was to become operative. The Government contended that this income was earned by and taxable to the taxpayers. Likewise, the partnership for 1957 reported as part of its gross income the sum of \$157,088.71 received for almonds and peaches which were raised by the 1956 partnership and which were sold and delivered to the buyer in 1956. The Government contended that this was income earned by and taxable to the 1956 partnership if a valid partnership was found to exist, and if not, was taxable to taxpayers. (I-R. 67.)

The District Court, in upholding the contention of the Government, held that taxpayers, having earned \$70,640.48 for crops sold in 1955, could not defeat or avoid their tax liability by assignment of the income to the 1956 partnership, and the 1956 partners, having earned \$157,088.71 for crops sold in 1956, could not defeat or avoid their tax liability therefor by assignment of the income to the 1957 partnership. (I-R. 68.)

Having determined the proper group to whom the income was taxable, the court then had to allocate the income among the Ramos family. As salary allowances had been made to Dolores Donaldson for the services which she performed for the partnership in 1956 and 1957 and to Joe S. Ramos for the services which he performed for the partnership in the last three months of 1957, the court credited Joe R. Ramos with the sum of \$4,200 for 1956 and the sum of \$3,150 for 1957. (I-R. 69.) Neither party takes issue with this allocation as to salary allowances.

Finally, in an attempt to allocate to taxpayers the income for 1956 allocable to the land, trees, and equipment used in the production and harvesting of the crop, the court held that (I-R. 69)—

Since all that the partnership received in 1956 from the plaintiffs was the use of the land, trees and equipment needed for the almond orchard operation, such use should be and is treated as a rental rather than a capital contribution, and the reasonable value thereof, as expressed in the 1957 agreement, is twenty-five percent of the crop income.

After allocating 25 percent of the 1956 crop income to taxpayers, the District Court allocated equally among the members of the 1956 partnership the sum of \$157,-088.71 received by the 1957 partnership for crops sold in 1956, and the rental agreement entered into for 1957 by the partnership was upheld. (I-R. 53-54, 70-74.)

The Government contends that the District Court erred in allocating to the taxpayers, as owners of all the operating assets used by the partnership, only 25 percent of the crop income for 1956, in allocating equally among the 1956 partners the sum of \$157,-088.71, and in recognizing the rental agreement for 1957, in that by so doing so the court has failed to uphold the basic tenet of income taxation that income from services is taxable to the person who renders the services and that income from property is taxable to the person who owns or controls the property. In addition, the District Court failed to allocate the partnership income as required by Section 704(e).

As was previously discussed in Argument I, Congress attempted by the Revenue Act of 1951 to bring the taxation of "family partnerships" into line with the fundamental principles generally applied in taxing income from property and services. However, because of the possibility of distorting income by a literal application of the objective test there established, Congress also imposed certain limitations on the recognition of otherwise valid partnership agreements insofar as allocation of income was concerned. As stated in H. Rep. No. 586, *supra*, pp. 33-34 (1951-2 Cum. Bull., p. 381):

Since legislation is now necessary to make clear the fundamental principle that, where there is a real transfer of ownership, a gift of a family partnership interest is to be respected for tax purposes without regard to the motives which actuated the transfer, it is considered appropriate at the same time to provide specific safeguards—whether or not such safeguards may be inherent in the general rule—against the use of the partnership device to accomplish the deflection of income from the real owner.

Therefor the bill provides that in the case of any partnership interest created by gift the allocation of income according to the terms of the partnership agreement shall be controlling for income tax purposes except when the shares are allocated without proper allowance of reasonable compensation for services rendered to the partnership by the donor, and except to the extent that the allocation to the donated capital is proportionately greater than that attributable to the donor's capital. In such cases a reasonable allow-

ance will be made for the services rendered by the partners, and the balance of the income will be allocated according to the amount of capital which the several partners have invested.

These same limitations are now contained in Section 704(e) (2) of the 1954 Code, which provides that the distributive share of a member of a family partnership whose interest was acquired by gift or purchase from another family member shall be determined by the partnership agreement "except to the extent that such share is determined without allowance of reasonable compensation for services rendered to the partnership by the donor, and except to the extent that the portion of such share attributable to donated capital is proportionately greater than the share of the donor attributable to the donor's capital." See also Treasury Regulations on Income Tax (1954 Code), Section 1.704-1(e) (3) (Appendix A, *infra*).

By allocating to taxpayers an amount which it felt was a reasonable rental allowance for the use of the ranch's operating assets, the District Court has held that a reasonable rental allowance is a proper substitute, to protect against improper income-shifting within a family group by use of a family partnership, for the protection which Congress devised in Section 704 (e) (2) of requiring the allocation of income based upon the capital contribution of each of the partners. Moreover, there is not any factual basis on which to support the court's finding that 25 percent of the crop receipts was a reasonable rental. The only mention of this percentage as "rent" appears in the rental agreement which was to be for a period subsequent to

the 1956 crop year and there is no indication that the rental agreement for that period was arrived at as the result of arm's-length bargaining.

That capital was a material income-producing factor in the operation of the Ramos ranch cannot be denied (see Treasury Regulations on Income Tax (1954 Code), Section 1.704-1(e)(1)(iv) (Appendix A, *infra*)), and as the partners were compensated for the respective services which they performed for the partnership,²² it is then necessary only to allocate the unallocated balance of the partnership income among the partners in accordance with their respective interests in partnership capital.

From the standpoint of capital needed for the operation of the Ramos ranch, the 175 acres of land and trees necessary to the production of the partnership income were valued at least \$175,000 (II-R. 129-131), the necessary equipment was of a value of at least \$15,000 (II-R. 134), and working capital in the amount of \$60,000 was required (II-R. 512-513).

Viewed in a manner most favorable to taxpayers, each of the four partners would have contributed \$15,000 to the needed working capital of \$60,000²³

²² It should here be noted that although the taxpayer-father has been credited with only nine months' salary for 1957 and the son has been credited with three months' salary at the same rate, still the record does not disclose that the father ever relinquished control over the business in any respect, and the partnership agreement (Ex. 1) specifically provides that his management decisions shall be final.

²³ The taxpayers argued below that receipts in the amount of some \$70,000 from the 1955 crops which were received by the 1956 partnership were to belong to the partnership for

and taxpayers would have also contributed land, trees and equipment worth at least \$190,000,²⁴ for a total capital of \$250,000. Thus, in 1956, taxpayers contributed \$220,000 of the total partnership capital of \$250,000. Accordingly, 22/25 of the unallocated in-

that year. Accepting taxpayer's contention for the purpose of allocating the income is to view the situation in the manner most favorable to taxpayers. To reject taxpayers' contention, as the Government contends it should be, would leave the children without a capital interest in the partnership for 1956 as they would then have no interest in any partnership assets. The mere right to participate in the earnings and profits of a partnership is not considered a capital interest in the partnership. Treasury Regulations on Income Tax (1954 Code), Section 1.704-1(e)(1)(v). If taxpayers' children had no capital interest in the 1956 partnership, Section 704(e) would not apply and all the income of the partnership, with the exception of the income allocated for services, would be allocated to taxpayers in accordance with the general rule of income taxation that income generated from property is taxable to the owner thereof. *Helvering v. Horst, supra*. Even if the 1955 crop receipts are considered to be assets of the 1956 partnership, the taxability of the 1955 income to the taxpayers is not affected thereby.

²⁴ If the partnership is recognized as being valid, then the land, trees and equipment belonging to taxpayers must be treated as if they had been contributed to the partnership. To treat them in any other manner, i.e., as having been rented to the partnership, is not supported by the evidence. The record evidence shows that no arrangements were made by the 1956 partnership to pay taxpayers any rent for the use of these assets. To treat the assets, for the purpose of allocating partnership income, as if they had been contributed to the partnership is supported by the fact that the economic effect of allowing the partnership the use of the assets without requiring any compensation therefor is the same as if they had been contributed to the partnership.

come of the 1956 partnership should be allocated to taxpayers.²⁵

For the year 1957, the District Court recognized the rental agreement between the taxpayers and the partnership in determining the amount allocable to taxpayers for the use during that year by the partnership of the land, trees and equipment comprising the Ramos ranch. The Government contends that the District Court erred in so doing, rather than allocating the unallocated income to the members of the 1957 partnership in accordance with the capital contribution of each. The rent called for by the rental agreement was not arrived at by any arm's-length bargaining and there is no evidence to show that it bore any relationship to a reasonable compensation for the use of the ranch and the other assets. Indeed, it appears that the figure of 25 percent was agreed upon so that the distributive share of taxpayer, which was now to be determined on the basis of a one-third interest as Mary Ramos was not to be a partner in 1957, would remain approximately the same as it was under the 1956 partnership agreement. Moreover, as was stated in Argument I, the partners themselves did not even follow the terms of the agreement in determining the rent payable to taxpayers for 1957.²⁶

²⁵ The allocation of 22/25 of the 1956 partnership's unallocated income to taxpayers would apply as well to the \$157,088.71 in crop receipts received by the 1957 partnership, but taxable to the members of the 1956 partnership.

²⁶ Attention is also directed to Section 707(c) of the Code and Section 1.707-1(c) of the Treasury Regulations, which provide that payments by a partnership to a partner for

Again viewed in the manner most favorable to taxpayers, the record here reflects contributions of capital by each of the partners in the following amounts: Taxpayer contributed land, trees and equipment worth \$190,000 (II-R. 129-131, 134) and each of the three partners contributed \$15,000 for working capital (Ex. 1). Thus, in 1957 taxpayer contributed \$205,000 of the total partnership capital of \$235,000. Accordingly, for the reasons stated in the discussion as to the allocation of the income of the 1956 partnership, 205/235 of the unallocated income of the 1957 partnership should be allocated to taxpayers.

CONCLUSION

For the reasons stated above, the decision of the District Court upholding the validity of the family partnerships should be reversed. Alternatively, if the validity of either or both of the partnerships is sustained on appeal, the cases should be remanded to the District Court in order to determine the income prop-

services or the use of capital shall be considered as made to a person who is not a partner only to the extent determined without regard to the income of the partnership.

erly allocable to taxpayers for the use of their assets in the operation of the ranch by the partnerships.

Respectfully submitted,

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AUGUST, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: ----- day of August, 1967.

STEPHEN H. PALEY
Attorney

APPENDIX A

Internal Revenue Code of 1954:

SEC. 704. PARTNER'S DISTRIBUTIVE SHARE.

* * * *

(e) *Family Partnerships.*—

(1) *Recognition of interest created by purchase or gift.*—A person shall be recognized as a partner for purposes of this subtitle if he owns a capital interest in a partnership in which capital is a material income-producing factor, whether or not such interest was derived by purchase or gift from any other person.

(2) *Distributive share of donee includible in gross income.*—In the case of any partnership interest created by gift, the distributive share of the donee under the partnership agreement shall be includible in his gross income, except to the extent that such share is determined without allowance of reasonable compensation for services rendered to the partnership by the donor, and except to the extent that the portion of such share attributable to donated capital is proportionately greater than the share of the donor attributable to the donor's capital. The distributive share of a partner in the earnings of the partnership shall not be diminished because of absence due to military service.

(3) *Purchase of interest by member of family.*—For purposes of this section, an interest purchased by one member of a family from another shall be considered to be

created by gift from the seller, and the fair market value of the purchased interest shall be considered to be donated capital. The "family" of any individual shall include only his spouse, ancestors, and lineal descendants, and any trusts for the primary benefit of such persons.

(26 U.S.C. 1964 ed., Sec. 704.)

Treasury Regulations on Income Tax (1954 Code) :

§ 1.704-1 *Partner's distributive share.*

* * * *

(e) *Family partnerships*—(1) *In general*—

(i) *Introduction.* The production of income by a partnership is attributable to the capital or services, or both, contributed by the partners. The provisions of subchapter K, chapter 1 of the Code, are to be read in the light of their relationship to section 61, which requires, inter alia, that income be taxed to the person who earns it through his own labor and skill and the utilization of his own capital.

* * * *

(iv) *Capital as a material income-producing factor.* For purposes of section 704(e)(1), the determination as to whether capital is a material income-producing factor must be made by reference to all the facts of each case. Capital is a material income-producing factor if a substantial portion of the gross income of the business is attributable to the employment of capital in the business conducted by the partnership. In general, capital is not a material income-producing factor where the income of the business consists principally of fees, commissions, or other com-

pensation for personal services performed by members or employees of the partnership. On the other hand, capital is ordinarily a material income-producing factor if the operation of the business requires substantial inventories or a substantial investment in plant, machinery, or other equipment.

(v) *Capital interest in a partnership.* For purposes of section 704(e), a capital interest in a partnership means an interest in the assets of the partnership, which is distributable to the owner of the capital interest upon his withdrawal from the partnership or upon liquidation of the partnership. The mere right to participate in the earnings and profits of a partnership is not a capital interest in the partnership.

* * * *

(3) *Allocation of family partnership income—*

(i) *In general.* (a) Where a capital interest in a partnership in which capital is a material income-producing factor is created by gift, the donee's distributive share shall be includible in his gross income, except to the extent that such share is determined without allowance of reasonable compensation for services rendered to the partnership by the donor, and except to the extent that the portion of such distributive share attributable to donated capital is proportionately greater than the distributive share attributable to the donor's capital. For the purpose of section 704, a capital interest in a partnership purchased by one member of a family from another shall be considered to be created by

gift from the seller, and the fair market value of the purchased interest shall be considered to be donated capital. The "family" of any individual, for the purpose of the preceding sentence, shall include only his spouse, ancestors, and lineal descendants, and any trust for the primary benefit of such persons.

(b) To the extent that the partnership agreement does not allocate the partnership income in accordance with (a) of this subdivision, the distributive shares of the partnership income of the donor and donee shall be reallocated by making a reasonable allowance for the services of the donor and by attributing the balance of such income (other than a reasonable allowance for the services, if any, rendered by the donee) to the partnership capital of the donor and donee. The portion of income, if any, thus attributable to partnership capital for the taxable year shall be allocated between the donor and donee in accordance with their respective interests in partnership capital.

(c) In determining a reasonable allowance for services rendered by the partners, consideration shall be given to all the facts and circumstances of the business, including the fact that some of the partners may have greater managerial responsibility than others. There shall also be considered the amount that would ordinarily be paid in order to obtain comparable services from a person not having an interest in the partnership.

(d) The distributive share of partnership income, as determined under (b) of this subdivision, of a partner who rendered services to the partnership before entering the Armed Forces of the United States shall not be diminished because

of absence due to military service. Such distributive share shall be adjusted to reflect increases or decreases in the capital interest of the absent partner. However, the partners may by agreement allocate a smaller share to the absent partner due to his absence.

* * * *

(26 C.F.R., Sec. 1.704-1.)

APPENDIX B

Exhibit Number	Exhibit Identified	Exhibit received or denied
Ex. 1	II-R. 65	II-R. 67
Ex. 2	II-R. 68	II-R. 72
Ex. 3	II-R. 72	II-R. 74
Ex. 4	II-R. 73	II-R. 75
Ex. 5	II-R. 52	II-R. 54
Ex. 6	II-R. 231	II-R. 233
Ex. 7	II-R. 232	II-R. 233
Ex. 8	II-R. 210	II-R. 211
Ex. 9	II-R. 170	II-R. 172
Ex. 10	II-R. 90	II-R. 90
Ex. 11	II-R. 51	II-R. 52
Ex. 12	II-R. 34	II-R. 36
Ex. 13	II-R. 178	II-R. 178
Ex. 14	II-R. 50	II-R. 51
Ex. 15	II-R. 176	II-R. 177
Ex. 16	II-R. 177	II-R. 177
Ex. 17	II-R. 49	II-R. 50
Ex. 18	II-R. 179	II-R. 179
Ex. 19	II-R. 41	II-R. 43
Ex. 20	II-R. 41	II-R. 45
Ex. 21	II-R. 45	II-R. 46
Ex. 22	II-R. 47	II-R. 48
Ex. 23	II-R. 48	II-R. 49
Ex. 24	II-R. 407	II-R. 407
Ex. 25	II-R. 75	II-R. 76
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Ex. 27	II-R. 179	II-R. 180
Ex. 28	II-R. 181	II-R. 181
Ex. 29	II-R. 181	II-R. 182
Ex. 30	II-R. 180	II-R. 181
Ex. 31	II-R. 209	II-R. 212
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Ex. 33	II-R. 55	II-R. 56
Ex. 34	II-R. 79	II-R. 80
Ex. 35	II-R. 79	II-R. 80
Ex. 36	II-R. 183	II-R. 183
Ex. 37	II-R. 192	II-R. 208

<u>Exhibit Number</u>	<u>Exhibit Identified</u>	<u>Exhibit received or denied</u>
Ex. 38	II-R. 211	II-R. 212
Ex. 39	II-R. 212	II-R. 216
Ex. 40	II-R. 205	II-R. 208
Ex. 41	II-R. 80	II-R. 81
Ex. 42	II-R. 54	II-R. 55
Ex. 43	II-R. 57	II-R. 57
Ex. 44	II-R. 395	II-R. 396
Ex. 45	II-R. 396	II-R. 396
Ex. 46	II-R. 208	II-R. 209
Ex. 47	II-R. 198	II-R. 208
Ex. 48	II-R. 201	II-R. 208
Ex. 49	II-R. 195	II-R. 208
Ex. 50	II-R. 204	II-R. 205
Ex. 51	II-R. 408	II-R. 412 (denied)
Ex. 52	II-R. 408	II-R. 412 (denied)
Ex. 53	II-R. 396	II-R. 396
Ex. 54	II-R. 23	II-R. 24
Ex. 55	II-R. 59	II-R. 60
Ex. 56	II-R. 218	II-R. 220
Ex. 57	II-R. 220	II-R. 220
Ex. 58	II-R. 221	II-R. 222
Ex. 59	II-R. 221	II-R. 222
Ex. 60	II-R. 221	II-R. 222
Ex. 61	II-R. 81	II-R. 81
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Ex. 65	II-R. 400	II-R. 401
Ex. 66	II-R. 401	II-R. 402
Ex. 67	II-R. 412	II-R. 412
Ex. 68	II-R. 36	II-R. 36
Ex. 69	II-R. 37	II-R. 37
Ex. 70	II-R. 402	II-R. 403
Ex. 71	II-R. 402	II-R. 403
Ex. 72	II-R. 227	II-R. 227
Ex. 73	II-R. 403	II-R. 404
Ex. 74	II-R. 225	II-R. 226 (denied)
Ex. 75	II-R. 228	II-R. 229
Ex. 76	II-R. 404	II-R. 404

<u>Exhibit Number</u>	<u>Exhibit Identified</u>	<u>Exhibit received or denied</u>
Ex. 77	II-R. 404	II-R. 404
Ex. 78	II-R. 405	II-R. 406
Ex. 79	II-R. 405	II-R. 406
Ex. 80	II-R. 406	II-R. 406
Ex. 81	II-R. 82	II-R. 412 (denied)
Ex. 82	II-R. 82	II-R. 412 (denied)
Ex. 83	II-R. 82	II-R. 412 (denied)
Ex. 84	II-R. 82	II-R. 412 (denied)
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Ex. 86	II-R. 82	II-R. 412 (denied)
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Ex. 89	II-R. 392	II-R. 395
Ex. A	II-R. 185	II-R. 185

Nos. 21,824 and 21,824-A

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

VS.

JOE R. RAMOS and MARY RAMOS,

Appellees and Cross-Appellants.

On Appeal from the Judgment of the
United States District Court for the
Northern District of California

BRIEF FOR APPELLEES AND CROSS-APPELLANTS

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FILED

OCT 23 1967

M. B. LUCK, CLERK

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Nos. 21,824, 21,824-A

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,

Appellant,

VS.

JOE R. RAMOS and MARY RAMOS,

Appellees and Cross-Appellants.

On Appeal from the Judgment of the
United States District Court for the
Northern District of California

SECTION I

REPLY BRIEF FOR APPELLEES

OPINION BELOW

The memorandum opinion and order of the United States District Court for the Northern District of California (I-R. 50-72) and the amendment thereto (I-R. 73-74) constitute the findings of fact and the conclusions of law of the trial Court. The trial Court's opinion has been officially reported in 260 F. Supp. 479.

JURISDICTION

Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

Appellees and cross-appellants present the following questions:

1. Whether the findings of fact and conclusions of law of the trial Court are supported by substantial evidence that valid partnerships were in existence during the calendar years 1956 and 1957.
 2. Whether or not the gifts to the children of a 25% interest each in the "crops business" and which interest was contributed by the children to the 1956 partnership, together with the services rendered to the 1956 partnership by the children, constituted a sufficient capital contribution and performance of service as to preclude re-allocation of income pursuant to the provisions of 704(e)(2) of the Internal Revenue Code.
-

STATUTES AND REGULATIONS INVOLVED

Please refer to Appendix A, Appellant's Opening Brief.

PRELIMINARY STATEMENT

This is a bifurcated appeal. Bifurcated, in the sense that the Government seeks to overturn the trial Court's finding of fact and judgment on the assertion that no valid partnerships for the years 1956 and 1957

existed between the members of the Ramos family. Appellees and cross-appellants seek a reversal from that portion of the judgment wherein a rental is charged against the 1956 partnership and added to the 1956 income of cross-appellants. Additionally, the cross-appellants seek a reversal of the trial Court's determination that the \$70,640.48 paid to the partnership in 1956 by Rosenberg Bros., for the balance due on the agreement of sale of the 1955 crop, was not partnership property but should be taxable solely to cross-appellants.

Throughout this brief, for identification purposes, we will refer to the defendant and appellant as the "Government"; and the plaintiffs, appellees and cross-appellants, Joe R. Ramos as the "father", and Mary Ramos as the "mother". Joe S. Ramos is referred to as the "son"; and Dolores Donaldson as the "daughter".

This brief is divided into two separate sections:

Section I treats with appellees' contentions that the trial Court's findings as to the existence of valid partnerships for the calendar years 1956 and 1957 are correct and more than amply supported by the record; and that the Government's contention as to its theory of "re-allocation" has no foundation in the record facts or in law.

Section II treats with questions and specifications of error raised by cross-appellants' cross-appeal as hereinbefore set forth.

We concur with the Government's statement that "the basic facts are virtually undisputed as supported

by the record evidence", *insofar as the facts relating to the existence of a 1956 and 1957 partnership.* (II-R. 54, 217 and 218.)

The Government openly and frankly concedes that the evidence supports the findings and that a family partnership was in existence for the calendar years 1956 and 1957. (Government's opening brief, page 3, under heading "Statement".) It is also of interest to note that there was little or no cross-examination of appellees' witnesses. Also worthy of note is that all of the exhibits received in evidence were offered by appellees, save and except one exhibit (Government's Exhibit "A"), which was at the outset offered by appellees, but at the Government's request (II-R. 185) was admitted as the Government's sole and only exhibit.

These two actions were ordered consolidated for a Court trial. By these actions plaintiffs sought income tax refunds. Action No. 40202 (hereafter referred to as the 1956 tax case) sought a refund of Fifty seven Thousand Nine Hundred Two and 93/100 (\$57,902.93) Dollars and interest in the amount of Eight Thousand Eight Hundred Ninety Four and 84/100 (\$8,894.84) Dollars plus interest at six per cent (6%) per annum as allowed by law. Action No. 40033 (the 1957 tax case) sought a tax refund of Fifty Thousand Four Hundred Fifty Eight and 31/100 (\$50,458.31) Dollars plus interest as allowed by law. The plaintiffs in the trial Court, asserted:

(1) that a family partnership was created and came into being in 1955;

(2) that a family partnership was in existence and operation for the tax years 1956 and 1957 and that proper partnership returns were made for these two years;

(3) that the 1956 partnership consisted of plaintiffs and their adult children, Dolores Donaldson, their daughter, and Joe S. Ramos, their son;

(4) that the personnel of the 1957 partnership consisted of the plaintiff, Joe R. Ramos, and their adult children; (Mary S. Ramos, the wife and mother, not being a member of the 1957 partnership);

(5) that the partnership was valid for all purposes;

(6) that the Internal Revenue Service improperly refused to recognize this partnership for these years and has improperly and unlawfully assessed the entire taxable income received from certain farming activities to the plaintiffs alone.

As the result of the trial, the documentary evidence offered and received, the testimony adduced, and the stipulations entered into, there is no substantial factual conflict. For all practical purposes the record presents matters of law arising from what is practically an agreed statement of facts. All of the evidence in the case, oral and documentary (save and except the Government's Exhibit "A"), was presented by the appellees. At the Government's request, all witnesses were ordered excluded from the Court room during the taking of testimony. At the conclusion of the appellees' case the Government *rested*¹ and did not see

¹Italics ours throughout unless otherwise noted.

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fit to offer any defense either by way of contradictory oral testimony or further documentary evidence. Nor did the Government move for a dismissal, evidently being satisfied that appellees had established their case. It is significant in this connection, and we direct attention to the fact, that the farming and business activities of the partnership, as well as the acts and conduct, both business and personal, of the individuals involved, have been under the close scrutiny and energetic and continuous investigation of government tax agents and investigators since December 1958. (Pltfs. Ex. No. 50.) Also of significance and emphatic note is the Government's frank and open concession that the testimony of the four witnesses, Ruben Lopez (II-R. 367-373), Charles Huff (II-R. 373-379), Frank Molina (II-R. 379-383) and Sam Silvey (II-R. 383-390), as to their knowledge of the formation, conduct and existence of the 1956 family partnership "*is fairly truthful.*" (II-R. 390a.)

At this point it is not amiss to direct attention to *Nicholas v. Davis*, 204 F. 2d 200-202 (a tax refund case) wherein the Court expressed itself in connection with a similar record as follows:

"When controlling, positive, and uncontradicted evidence is introduced, and when it is unimpeached by cross-examination or otherwise, is not inherently improper (improbable), and no circumstance reflected on the record casts doubt on its verity, then under the principles laid down in *Chesapeake & Ohio Ry. Co. v. Martin*, 283 U.S. 209, 215-220, it may not be disregarded, *even though adduced from interested witnesses*, and no

question of credibility or issue of fact is presented for determination by the jury.”

See also:

Pence v. U.S., 316 U.S. 332, 339, 340;

Alameda Title & Trust Co. v. Millsap, 71 F. 2d 518, 520;

S.F. Assn. for Blind v. Industrial Aid, 152 F. 2d 532, 536.

STATEMENT OF FACTS

(A) The Partnership Background.

Joe R. Ramos was born in Spain and came to the United States just before his sixteenth birthday in 1925. He is a man of no formal education; his total schooling in Spain was five months; his schooling in the United States consisted of about a month's study in preparation of his application for citizenship, which was granted to him in 1950 or 1951. In 1931 he married Mary S. Ramos at Auburn, Placer County, California. Both of their children were born in Loomis, Colusa County; their daughter Dolores Donaldson on November 15, 1931, and their son, Joe S. Ramos on September 17, 1934.

Joe R. Ramos began his own farming operations in 1932 in Colusa County. His farming activities consisted generally in the raising and marketing of corn, rice and wheat crops. He ceased his farming activities in Colusa County by reason of the purchase of a 219 acre almond ranch at Winters, California. This ranch has been referred to as the “Ramos Home Ranch” or

the "Home Ranch." At the time of the purchase in late 1943 or early 1944 he established the family home at the Winters ranch. At this time Dolores was about twelve and a half ($12\frac{1}{2}$) years of age, and Joe S. Ramos was about nine (9) years of age. Both children finished their grade schools in the Winters area. Thereafter the children attended the local high school at Winters. Upon the completion of the regular high school course, both Dolores and Joe S. Ramos were in regular attendance at and graduated from Sacramento Junior College—Joe S. Ramos in June 1955.

If there is any one particular fact in this case, which has been proved beyond the peradventure of doubt, it is the fact that it was the definite intention, understanding and avowed purpose that when the son reached his twenty-first birthday that a family partnership would come into being. (II-R. 19, 145, 154, 426-427). Such idea and purpose was acted upon as early as the year 1946 when Joe R. Ramos sought the advice of his then attorney, Mr. Ford, of Colusa County, as to the wisdom and propriety of forming a family partnership with his wife and children (II-R. 13).

The record, without the slightest contradiction, evidences the fact that this long-nurtured ambition, purpose and intent was entertained by both the parents and the children. It is clearly reflected in uncontradicted testimony that both children during their early years, worked year in and year out at ranch and farming chores at both the Colusa ranch and the home ranch at Winters (II-R. 10). As they progressed in

years, maturity and ability, they were responsible for and took on more and more of an active participation in the various ramifications of farm work in and about the ranch and the crops (II-R. 10). The record shows that while Dolores was in high school she began to learn bookkeeping in connection with the books of account and records of the ranch (II-R. 11). She was tutored in this work by Mr. Beverly Laugenour, the certified public accountant who for many years was in charge of the books of account and responsible for the tax returns of Mr. and Mrs. Joe R. Ramos (II-R. 11). Later, and when she was a partner with her father in the building company of Ramos & Albecete, she likewise performed bookkeeping services for that company. This was consistent and in line with the end result that when the family partnership came into being and was in operation that Dolores would have had the necessary training, experience and competence to handle and serve as the partner in charge and control of the firm's books of account and records (II-R. 11).

Correspondingly true is the crystal clear picture depicted by the record of the careful training that the son received at the hands of his father in preparation for his eventual work as the "outside" partner. Young Ramos' many years of apprenticeship were not confined to mere menial farm chores. To the contrary, he was meticulously and patiently instructed and trained by his father as to the practical aspects and basic intricacies concerning the complete operation and management of almond ranching activities; ac-

tivities relating to the planting, care and production of crops, particularly almond crops; for example, he was shown how to shape up young trees (II-R. 421), how trees should be cut on the south side so as to balance out the tree (II-R. 421), how to plant trees (II-R. 421), the proper time for spraying (II-R. 421), the pruning of trees, the detail with reference to land contours (II-R. 423), the placing of markers on given trees indicating the direction of levees (II-R. 423), matters pertaining to pollinization (II-R. 423). Important also was the training that he received from his father in connection with the hiring and recruiting of field workers for crop harvesting (II-R. 27). The witness, Ruben J. Lopez (II-R. 372), depicts this phase of the young man's training by his recitation of the facts in connection with the July 1955 trip of young Joe S. Ramos, conversant in the Spanish tongue, and his father to Mexico, in the company of Mr. Lopez, for the sole and definite purpose of hiring and recruiting harvest workers for the 1955 almond crop. Mr. Lopez likewise testified, that the hiring of foreign national farm workers in connection with crop harvesting activities was the most important part of the ranch operation because it had to do with the actual harvest of the crops.

Highly expressive of the purpose, meaning and intent of this training is significantly stated in the following testimony of the son:

“Q. —Do you recall his saying anything to you, why he was taking the pains to show you these various things?

A. Yes.

Q. Why? What did he say to you?

A. He said he was going to make me a partner when I turned 21.

Q. *Make you a partner when you reached 21?*

A. *So he was teaching me."* (II-R. 421)

And again at pages (II-R. 424-425) young Ramos testified:

"Q. At the time that you graduated from college and just prior to your 21st birthday, did you consider as a result of the years on the ranch and the instruction at the hands of your father and other matters, that you were an experienced almond farmer?

A. Yes, I did.

Q. Did you feel that you could take your place upon the ranch and operate it?

A. Yes, I did.

Q. And after you reached your 21st birthday, did you operate the ranch?

A. Yes, I did.

Q. Did you supervise men and give orders and tell people what to do?

A. Yes, I did." (II-R. 424-425)

It is not open to question that on numerous occasions the subject of a family partnership was discussed by and among members of the family, and that these discussions became more numerous and pointed as Joe S. Ramos neared his twenty-first birthday. Likewise, we do not believe it will be disputed that the finalizing of the agreement to form the partnership actually took place about the time Joe S. Ramos graduated from Sacramento Junior College in June

1955. In this connection it is to be remembered that immediately upon graduation he went to work on a full-time basis at the home ranch in connection with the 1955 crop and, because of his draft status, he entered the United States Navy, but not until November 1955, at a time when the 1955 crop had been completely harvested and the lands prepared for the 1956 crop. (II-R. 26)

We feel that the Court will not be insensitive to the plain and legitimate inferences which may properly be indulged in and drawn from the record in this case; legal inferences which compel the conclusion and establish the fact that the Ramoses are an affectionate, closely-knit, loyal and harmonious family. It is the "old country" type of family of halcyon days; the type of family where the father is the actual, and not the titular, head of the family; where the virtues of filial respect, obedience and industry are the daily way of life; where the good things of life are worked for, nurtured and preserved; and where the ultimate end of fruitful endeavors is the enjoyment of their natural passage from the parents to the children—"eventually that someday they would take over the complete management themselves, the children." (II-R. 515)

As the result of our legal research we are satisfied that the ultimate fact as to the existence and operation of a valid family partnership for the years in question may be properly resolved and decided in accordance with the principles enunciated in *Commissioner v. Culbertson*, 337 U.S. 733, 93 L. Ed. 1661,

decided in 1949. The yardstick by which the trial Court is to admeasure the "family" partnership is set forth at page 742 of the Chief Justice's opinion, where it is declared:

"The question is *not* whether the *services* or *capital* contributed by a partner are of sufficient importance to meet some *objective* standard supposedly established by the Tower Case, but whether, considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent—the *parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise.*"

We assert that the record in the instant case amply meets the test laid down by the *Culbertson* case. In the words of the Supreme Court, "There is nothing new or particularly difficult about such a test." We shall, therefore, proceed to analyze the record in Ramos in light of the tests set forth in *Culbertson*.

(B) The 1956 Partnership.

The partnership in existence and operating the almond ranch at the "Home Ranch" in 1956 was composed of the plaintiffs, Joe R. Ramos and Mary S. Ramos, husband and wife, and the mother and father of Mrs. Dolores Donaldson, their daughter, and Joe

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(B) The 1956 Partnership.

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S. Ramos, their son. This partnership was the product and culmination of the definite and often expressed intent that the Ramos family would engage in the farming business as a family partnership when Joe S. Ramos, the son, reached his twenty-first birthday. (II-R. 16-17, 19) No serious question may properly be raised as to the good faith or the intention and determination of the Ramos family to engage in the farming business as a family partnership, as such was the avowed intent and ultimate goal of this family. Nor may it be questioned that both the intent and the goal became an accomplished fact. This family partnership commenced its farming functions for a business purpose in 1955 to become effective January 1, 1956. It operated on a cash and calendar year basis.

The negotiations leading up to this partnership, and the partnership agreement itself, were entirely oral. The parties did not reduce their agreements to writing; they did not formalize their understanding and intentions by any written instrument because they had been led to understand that a good and sufficient partnership could be created without the necessity of documentation or other written formalities. As expressed by the father: "——we understand we don't have to have paper between the family." (II-R. 69)

We believe the Court throughout the trial had carefully scrutinized the witnesses and in particular had paid careful attention to the testimony of those members of the Ramos family and had observed the manner in which these witnesses gave their testimony. We

likewise believe that the Court concluded that these witnesses were candid and sincere;—reliable and truthful. We likewise are satisfied that the Government will readily concede that the testimony given by these particular witnesses was truthful.

Perhaps the most expressive statement of the existence and operation of the 1956 partnership is to be found in the testimony of Mrs. Dolores Donaldson as elicited on cross-examination:

“Q. That is essentially all he gave you on the ranch in '56, wasn't it, just an interest in the profits?

A. No.

Q. What was your interest? You didn't own land, did you Mrs. Donaldson, or any interest in the land?

A. No, we don't own the land.

Q. You don't own any interest in the machinery?

A. No.

Q. There was no cash capital put into the partnership in '56?

A. No.

Q. Well, what was your twenty-five per cent interest in 1956?

A. *In the partnership agreement. When we formed it we were going to be partners, were going to be a family partnership, all together, and whatever income we made we would share.*

If we had losses, we would share them and we would pay our expenses, and whatever was left we could share twenty-five per cent, my father, my mother, my brother and I. I don't think you have to own land to have a share in anything.

Q. In other words, you feel you can participate in the profits from the land without owning any portion of the land?

A. Yes.

Q. And this is the type of partnership interest that you had, just in the profits generated by the assets?

A. *Profits or losses that would be produced by the almond trees on the land.*" (II-R. 301-302)

The terms of the partnership agreement were carried out in the utmost of good faith, and we believe it self-evident that the members of the 1956 partnership honestly and conscientiously did their very best to conduct the ranch business in accordance with their partnership agreement. The 1956 partnership income tax return was made in accordance with the agreement and the income received by each of the partners for their partnership shares was strictly and accurately accounted for in the individual returns of the respective parties to both the Federal and State governments. The partnership books of account for the year 1956 likewise indicate and reflect the partnership agreement. The testimony of Dolores Donaldson clearly demonstrated that the books were kept in the regular course of business and with the ultimate purpose in mind of having the partnership accounts in such order that a proper partnership tax return could be made covering the calendar year 1956.

It is true that the 1956 partnership lacks the indicia prevalent in a so-called "formalized" partnership; a partnership name was neither adopted nor used and no separate partnership bank accounts were

maintained. However, as above stated, the books of account clearly reflect what were to be considered as partnership items and what were to be considered as items personal to Joe R. Ramos and Mary S. Ramos. It is elementary law that mere indicia of outward manifestation, very often associated with partnerships, is neither material nor controlling with reference to the establishment of a valid intent to form and operate a partnership. If, in truth and in fact, as in this case, the partnership was actually created and was operated in good faith and for a definite business purpose, such is all that the law requires. It is not amiss at this point to reflect and consider that the business operations on the home ranch in connection with the almond crop were not of such magnitude as, for example, might be incurred in a partnership as that of Merrill Lynch, Pierce, Fenner & Smith, or other comparable commercial enterprises filled with the intricacies and complexities inherent in big business.

On the subject of bookkeeping records in connection with *farming* activities, it has been stated in *Britt's Estate v. C.I.R.*, 190 F. 2d 946:

“As to the bookkeeping records, farming is not a type of business in which elaborate records are usually kept. Nor are the members of a family, when dealing inter se, as likely to observe formalities as strictly as when dealing with others. Spurious agreements, designed to evade taxes, are frequently in better form than genuine ones. The records here kept were adequate and appropriate for the purpose, and present no evidence of distortion or concealment of facts.”

As to the physical absence of Joe S. Ramos from actual farming operations during the year 1956 the Court will appreciate that this absence was occasioned solely by circumstances over and beyond the control of young Ramos. He plainly stated the reasons which compelled his Navy enlistment. In answer to a question put to him by the Court as to whether there was any particular reason why he picked the November date to go into the Navy, he answered as follows:

“Well, I wanted to help my father, wanted to help finish up the crops before I went in, and also at that particular time the draft was getting—breathing down my neck, too, and the Navy came out with a deal, all reserve units, it was that, well, if you join now, you have your choice of either Atlantic or Pacific Fleet, and I wanted to get on the Atlantic Fleet.” (II-R. 425.)

It will be remembered that at this time young Ramos had completed his education, he was twenty-one years of age, he was unmarried, and he had no physical disabilities. It was obvious that he was immediately available for military draft. Faced with this situation, and in common with the problem confronting such able-bodied men of his age group, he had to make an election as to whether to continue with his present physical partnership activities, with the present call to service hanging over his head, or to meet the situation head-on and discharge his military obligation.

His sister, Mrs. Donaldson, sheds light upon her brother's frame of mind relative to the problem of his military service as disclosed by her testimony:

The Court: May I ask one thing? Do you know when your brother first started to go into the Navy?

The Witness: Well, he was in the Navy Reserve when he was going to high school. And when he was graduating from college, he stated all the time that if he didn't go in right away, the Army was going to draft him and he had to do something. He wanted to get it over with, so he kept repeating that pretty soon he was going to have to do something, that he would have to go in the Navy because he didn't want to go in the Army.

The Court: Do you recall when you agreed, when the family agreed to start this partnership in the beginning of 1956?

The Witness: In the fall, after his birthday, and he decided he was going into the Navy.

The Court: That is what I want to know. When did he decide he was going to go into the Navy, *before or after* you agreed on the family partnership?

The Witness: I think he decided to go in the Navy before.

The Court: Before you decided to form the family partnership? *What is your best recollection?*

The Witness: Well, I really can't remember because we just knew he was going in the Navy all the time, so when the actual date he enlisted is, I don't know.

The Court: Was there any discussion at any time about holding the partnership up until he got back from the Navy?

The Witness: *Oh, no. He was just a partner. If he had to go to the Navy, he had to go, but he was still a partner.* (II-R. 157-158)

Further, it is the uncontradicted record that Joe S. Ramos was not unmindful of his partnership status and that he participated in the operation and conduct of the business as best he was able in view of the circumstances which necessitated his absence from the ranch. He has testified that he was in regular communication by letter correspondence with the members of his family, and in particular with his father and his sister. By means of letter correspondence he gave his counsel and advice, and expressed his views as to definite and material matters affecting the successful operation of the partnership farming activities. Also, it is to be remembered that during the occasion of the visit of his mother, sister and fiancée to the Island of Hawaii where he was stationed, he had made known to them his concerns in connection with the partnership activities, and discussed with them the various farming problems and partnership activities. Also, it is a matter of express statute that a partner is not to suffer penalty, or to have his partnership interest jeopardized, because of absence due to military service. (Internal Revenue Code of 1954, Sec. 704 (e) (2).)

(C) The 1957 Partnership.

The history of the coming into being of the 1957 partnership is essentially a plain and simple one. Mr. Beverly Laugenour was the accountant for many years for Mr. and Mrs. Joe R. Ramos. He had prepared their tax returns from 1943 through 1955. He has stated (Pltfs. Ex. 89):

“Although aware that a family partnership would be formed when the son, Joe S. Ramos, and daughter, Dolores, were both of age, I took no technical interest in these discussions because there was, in my opinion, no action necessary to accomplish this relationship for the purpose of preparation of income tax returns. I was subsequently informed that the family partnership became operative as of January 1, 1956.”

In 1956 the personal affairs of Mr. Laugenour reached the point where he felt that he could no longer handle this particular account. He suggested to the Ramos family that the work be turned over to Mr. George Franzman, another certified public accountant. Mr. Franzman accepted the employment and from then on became the accountant and tax authority for the Ramos family. Mr. Franzman's testimony very clearly reflects the situation concerning the Ramos family affairs in his initial meetings with the members of the family. Summarized the following narrative is unfolded in the record:

He first met the Ramos family at their ranch in Winters. (II-R. 480) When he first went to the ranch with Mr. Laugenour there were present “Joe Ramos, his wife, Mary, and the daughter, Dolores Donaldson.” (II-R. 481) On the occasion of his first visit and meeting with these parties he was advised that their business was being carried on as a partnership (II-R. 481); that he was advised that this partnership was composed of Joe Ramos, his wife, his daughter and his son”. (II-R. 482) He went well into the

background leading up to the 1956 arrangement, and Mr. Ramos told him that it was a partnership. (II-R. 482) He reviewed with Mr. Ramos "all of these experiences that he had had, consultation with attorneys for many years." (II-R. 482) "He advised me that he had at one time consulted with an attorney in Colusa on this same subject, about the forming of a partnership. The attorney advised him at that time that he did not think it advisable because the children were still minors and he would run into legal guardianship problems, so he advised Mr. Ramos to wait until both children were 21. Dolores Donaldson had reached 21 at that time and Joey was still a minor, so he reached age in 1955. So therefore this would have been the first year of the partnership." (II-R. 483) Generally he was informed that "it was a partnership effective the beginning of the calendar year. The profits after all charges were to be split four ways . . .". (II-R. 483) Mr. Franzman on inquiry found that all of the physical assets were owned by Mr. Joe R. Ramos; the ranch, the trees and the ranch machinery. (II-R. 483) Changes were made with reference to the family operation in the year 1957. (II-R. 486)

Mr. Franzman then gave this significant testimony:

"Q. Yes, and do you know who was instrumental in having that change made?

A. Well, I guess I was.

Q. All right, tell us about that.

A. *Well, one of the first questions I asked all the members of the family, whether there was a written partnership agreement on this, and I*

found out that there was none, so I said, 'Well, in my opinion, we should firm up this a little more. It's fine what's in your heart, yes, it's a partnership within your heart or the heart of each one of you, but for legal purposes we probably should firm it up a little. Something might happen to you, might happen to Joey, Dolores. You don't know, you don't know what you might get involved in.' So I suggested some type of a partnership agreement be drawn up."

According to Mr. Franzman's recollection he first met Joe S. Ramos, the son, after his separation from the military service. (II-R. 415) There had been no discussion that the partnership was to be delayed due to the fact that Joe S. Ramos was in the military service. (II-R. 415)

The Ramos family accepted Mr. Franzman's opinion and advice with the result that the 1957 partnership came into existence on a formalized basis.

The documentary evidence in support of the 1957 partnership offered and received as proof of the so-called "formal" partnership, is to be found in plaintiffs' exhibits numbered and designated as follows:

Pltfs Ex #1. Original of "Partnership Agreement" dated January 5, 1957, between Joe R. Ramos, Dolores Donaldson and Joe S. Ramos;

Pltfs Ex #2. "Memorandum of Rental Agreement", executed by Joe R. Ramos and Company, and signed by Joe R. Ramos, Joe S. Ramos and Dolores Donaldson, and also bearing the individual signature of Joe R. Ramos and Mary S. Ramos;

- Pltfs Ex #3. A certified copy of Certificate of Transacting Business Under Fictitious Name of "Joe R. Ramos & Co.", as the same appears of record on file in the office of the County Clerk of the County of Solano, State of California;
- Pltfs Ex #4. Affidavit of Publication (duplicate copy) of the foregoing Certificate of Transacting Business Under Fictitious Name;
- Pltfs Ex #5. Photostatic copy of signature card of the First National Bank of Dixon, California, of Joe R. Ramos & Co., in connection with a commercial account and savings account, dated March 26, 1957, and signed by Joe R. Ramos and Mary S. Ramos, together with photostatic copy of reverse side of said signature card, showing account opened March 26, 1957 by a deposit of \$15,000.00 and a deposit in savings account No. 8737 of \$58,441.35 on May 22, 1957, as well as other data;
- Pltfs Ex #6. The original books of account and bookkeeping records of Joe R. Ramos & Co.;
- Pltfs Ex #7. The original books of account and bookkeeping records of Joe R. Ramos;
- Pltfs Ex #8. Bank statements pertaining to the commercial account of Joe R. Ramos & Co. for 1957, with the First National Bank of Dixon, Dixon, California;
- Pltfs Ex #9. Cancelled checks drawn on the aforesaid commercial account on said bank, for the year 1957, starting with check No. 1;
- Pltfs Ex #10. Book of duplicate deposit slips of Joe R. Ramos & Co. with the First National Bank of Dixon, showing deposits to both commercial and savings accounts of Joe R. Ramos & Co. during the year 1957;

Pltfs Ex #14. Cancelled check No. 624 dated February 14, 1957, drawn on Bank of America, Winters Branch, by Joe R. Ramos, to the order of Dolores Donaldson, in the sum of \$38,040.86, bearing endorsement in blank by Dolores Donaldson;

Pltfs Ex #15. Photostatic copy of Cashier's Check, and reverse side thereof, No. 15297, of American Trust Company, Woodland office, dated February 15, 1957, payable to the order of Internal Revenue Service in the amount of \$16,028.67 (Dolores Donaldson);

Pltfs Ex #16. Photostatic copy of Cashier's Check, and reverse side thereof, No. 15296, of American Trust Company, Woodland office, dated February 15, 1957, payable to the order of Franchise Tax Board in the amount of \$1,160.34 (Dolores Donaldson);

Pltfs Ex #17. Photostatic copy of Cashier's Check, and reverse side thereof, No. 15583, of American Trust Company, Woodland office, dated March 25, 1957, payable to the order of Joe R. Ramos & Co., in the amount of \$15,000.00, and bearing endorsement on the reverse side "Joe R. Ramos and Co. by Joe R. Ramos";

Pltfs Ex #21. One sheet containing photostatic copy of check, and reverse side thereof, being Cashier's Check No. 1388425 of Bank of America, Winters Branch, dated March 27, 1957, payable to the order of Joe R. Ramos, in the amount of \$15,000.00 (Joe S. Ramos);

Pltfs Ex #25. Cancelled check of Joe R. Ramos & Co., No. 274 dated February 6, 1958, drawn on the First National Bank of Dixon, payable to the

order of Joe R. and Mary Ramos, in the amount of \$15,000.00;

Pltfs Ex #26. Cancelled check of Joe R. Ramos & Co. No. 278, dated February 6, 1958, drawn on the First National Bank of Dixon, payable to the order of Joe S. Ramos in the amount of \$15,000.00. Said check bears endorsement in blank of Joe S. Ramos;

Pltfs Ex #27. Cancelled check of Joe R. Ramos & Co., No. 276, dated February 6, 1958, drawn on the First National Bank of Dixon, payable to the order of Dolores Donaldson, in the amount of \$15,000.00;

Pltfs Ex #30. Duplicate deposit slip, Commercial Tenplan Account, Bank of America, Winters Branch, dated February 7, 1958, and showing deposit to account of Dolores Donaldson or Junior E. Donaldson of check bearing clearing house No. 90-515, in the amount of \$15,000.00;

Pltfs Ex #31. Copy of statement of Commercial Account, consisting of two pages, with Winters Branch, Bank of America, of account in name of Junior E. Donaldson or Dolores Donaldson, and covering the period from January 10, 1958 to July 16, 1958;

Pltfs Ex #33. Copy of U. S. Partnership Return of income for the calendar year 1957 of Joe R. Ramos & Co.;

Pltfs Ex #34. Original of letter dated June 17, 1963 from Harter Packing Company to Duffy, Walton & De Dobbeleer in re Joe R. Ramos & Co.;

Pltfs Ex #36. Employer's copy of Workmen's Compensation Insurance Payroll Report for 1957 of

Joe R. Ramos & Co., signed "Dolores Donaldson, Partner";

Pltfs Ex #37. Copy of Employer's Annual Tax Return for Agricultural Employees for year 1957, prepared by "Dolores Donaldson, partner," for Joe R. and J. S. Ramos and D. Donaldson
Joe R. Ramos & Co.
Route 1, Box 135
Winters, Calif.
1-1-56;

Pltfs Ex #38. Statement, consisting of two sheets, of Harter Packing Co. in account with Joe R. Ramos & Co. for almond crop purchased and other matters in connection with said transaction re 1957 crops;

Pltfs Ex #39. Invoices, Sam Finegold, No. 18340 and No. 18938 dated 8-14 and bearing stamp showing payment 8-14-57 to Joe Ramos & Co.;

Pltfs Ex #40. Agricultural Employer's Social Security Tax Guide, Circular A, issued by the Internal Revenue Service, U.S. Treasury Department, and addressed to Joe R. and J. S. Ramos and D. Donaldson
Joe R. Ramos & Co.
Route 1, Box 135
Winters, Cal. 94-1398198-A
1-1-56;

Pltfs Ex #55. Photostatic copy of Almond Contract with Harter Packing Co. bearing date of November 26, 1957, consisting of two pages, and signed by "Joe R. Ramos and Co., seller, and Harter Packing Co., buyer, by Sebastian R. Lopez";

Pltfs Ex #57. Check No. 4383 of Harter Packing Co. to the order of Joe Ramos Co., together with

endorsement on the reverse side of said check; check in the amount of \$35,000.00;

Pltfs Ex #58. Checks Nos. 4554, 560, 794 and 810, of Harter Packing Co., each payable to the order of Joe R. Ramos & Co., together with endorsements on the reverse side of each check;

Pltfs Ex #60. Photostatic copy of one sheet with reference to Harter Packing Co. account with Joe R. Ramos & Co. in re the 1957 almond crop;

Pltfs Ex #63. Statement of First National Bank, Dixon, California, dated April 9, 1957, debiting the account of Joe R. Ramos & Co. in the amount of \$12.43 for check imprinting, and the reverse side showing payment of said sum on said date;

Pltfs Ex #87. Photostatic copy consisting of two pages of ledger sheets or statement of account with the First National Bank of Dixon—Account No. 8737—Joe R. Ramos & Co.—from May 22, 1957 to June 30, 1963.

The record with reference to the proof of 1957 partnership is replete with indicia pointing up the fact that the producing, harvesting and sale of the 1957 almond crop was conducted as a partnership enterprise.

The salient points favorable to the plaintiffs' proof in this connection may be summarized as follows:

1. The partnership operations were conducted in accordance with recognized business practices;

2. Each of the partners made capital contributions of \$15,000.00, and that these respective capital contributions were necessary to and were utilized by the partnership in connection with 1957 operations;

3. That the partners, Joe R. Ramos and Dolores Donaldson, each rendered vital services to the partnership in accordance with their previous understandings and agreements and did the work allocated to them;

4. That the partner, Joe S. Ramos, by reason of his military service, was not able to be physically present in connection with the bulk of the 1957 farming operations.

However, in this connection it is to be further noted that immediately upon his discharge on October 4, 1957, which took place at the Receiving Station at Treasure Island, Joe S. Ramos immediately went home to work on the ranch. (II-R. 442) There was no "time-off" nor the taking of any vacation, nor any loss of time from the actual time of discharge to his immediate return to his work at the ranch. He testified that he went right to work "*because we was on the tail end of the almond harvest at the time.*" (II-R. 443.) The record in this respect also indicates that he worked continuously on the ranch from October 4, 1957 to the end of the year; a period of three months.

Likewise, it is of importance to note the following testimony of the son in connection with the problem presented as a consequence of his military service.

"Q. What arrangement or understanding was had with reference to the fact that you were going to be in the Military Service? Everybody was acquainted with that, weren't they?

A. Yes.

Q. All right, was it discussed?

A. Yes, it was.

Q. All right. Well, what was the understanding among the members of the partnership of the effect that this military service was going to have on the partnership?

A. *It wouldn't have no effect at all.*

Q. Well, let me ask you this. Who was going to do your share of the work?

A. *It was an understanding that we had, that I had with my father, that he would take care of things while I was gone and when I came back, I would make it up, and then he could take it easy.*

Q. In other words, he was going to work a little harder while you were in the service, is that it?

A. Yes.

Q. And you would try to make it up to him when you got back, is that it?

A. Yes.

Q. Well, I take it then there was never any intention that the partnership would be deferred while you were in the service or put off until you got back?

A. No." (II-R. 464-465)

On the subject of military service as affecting a partner's interest, we respectfully direct the Court's attention to the following cases as authorities to the effect that where the intent has been established to form a partnership, the fact of absence from the partnership as a result of military service is of no consequence.

Culbertson v. C.I.R., 168 F. 2d 979;

Seabrook v. C.I.R., 196 F. 2d 322;

Crossley v. Campbell, 87 F. Supp. 862;
Anderson v. Robinson, 115 F. Supp. 776;
Sklarsky v. U.S., 153 F. Supp. 796.

SUMMARY OF ARGUMENT

I. The United States District Court did not err in finding and concluding that valid partnerships existed for the years 1956 and 1957. The record contains substantial evidence to support the findings of fact, conclusions of law and judgment based thereon.

II. There was no basis for any reallocation, for the reason that the clear and uncontradicted record shows that the father and mother had irrevocably divested themselves of their *sole and exclusive* use, enjoyment and control of the lands, trees, equipment and accounts receivable; that they further divested themselves of this sole and exclusive right of use and control of their properties on September 17, 1955, at the time of the creation of the partnership with their children; that this gift to the children of a 25% interest each in and to the crops, business and assets thereof, was a gift of a present business interest and not an assignment of future income. The son and daughter each made capital contributions to the 1956 and 1957 partnerships and rendered substantial and valuable services thereto.

ARGUMENT

I.

THE DISTRICT COURT DID NOT ERR IN ITS FINDING THAT THERE WAS A VALID FAMILY PARTNERSHIP COMPOSED OF TAXPAYERS AND THEIR CHILDREN DURING 1956, AND A VALID FAMILY PARTNERSHIP COMPOSED OF TAX-PAYER, JOE R. RAMOS, AND THE CHILDREN DURING 1957.

It is basic appellate law that (1) the Court of Appeals will not re-try the issues of fact or substitute its judgment with respect to such issues for that of the United States District Court. (2) The Court of Appeals will not set aside a finding of fact of the District Court unless there is no substantial evidence to sustain it, unless it is against the clear weight of the evidence, or unless it was adopted by an erroneous view of the law. (3) Full effect will always be given by the Court on appeal to the opportunity which the Federal District Court had to observe witnesses, judge their credibility, and draw inferences from contradictions in the testimony of even the same witness. (4) The power of a Federal District Court to decide doubtful issues of fact is not limited to deciding them correctly. (See *General Casualty Co. of America v. School District No. 5*, 233 F. Rep. 2d p. 526.

The foregoing case is only one of a number of cases decided by this Honorable Circuit and sets forth well known and salutary rules governing appeals. As has heretofore been observed, both in the Government's opening brief and in our brief, the facts of these cases at bar are virtually uncontradicted, and there is no good reason to burden this Court with any further detailed review of the evidence because as ap-

pears the record more than amply supports the trial Court's findings that valid family partnerships were created and were in existence during the calendar years 1956 and 1957. To attempt to hold otherwise would be in effect to endeavor to make new findings of fact without supporting evidence. We respectfully submit on the basis of the sufficiency of the evidence to sustain the trial Court's findings that the record is overwhelmingly in favor of the appellees.

The controlling authority is the landmark *Culbertson* case (*Comm. v. Culbertson*, 337 U.S. 733), and appellees, with propriety could conclude this section of their brief in complete reliance upon the authority of *Culbertson*. However, a great body of case law has stemmed from *Culbertson* and the reading of these cases are both edifying and persuasive. They are the many cases which have dealt with a variety of factual situations concerning family partnerships; all are in consonance with the legal principles established by *Culbertson*.

Accordingly, we wish to be clearly understood that the omission to document these cases in this brief, either by way of quotation, digest or syllabus, has not been prompted by any lack of energy on our part, or with the thought of treating the body of case law in a cavalier manner; rather, it is our considered and respectful opinion that the Court itself would prefer to peruse these cases from the published reports, rather than be burdened in the reading of page after page of close, printed matter setting forth by way of quotation, statement or comment the contents of each

particular case. We feel that this brief should be contained within the boundaries of reasonable page limits. Therefore, we respectfully refer the Court to the following table of authorities wherein we have listed the cases which have decided factual situations comparable to that facing the Ramos family; cases which are in complete harmony with the salutary principles enunciated in *Culbertson*.

Following are the cases referred to:

- Alexander v. C.I.R.*, 194 F. 2d 921 (see footnotes 2-3, pp. 923-924);
- Anderson v. Robinson*, 115 F. Supp. 776;
- Ardolina v. C.I.R.*, 186 F.2d 176;
- Barrett v. C.I.R.*, 185 F. 2d 150;
- Bologna v. Donnelly*, 112 F. Supp. 533;
- Campbell v. Batman*, 239 F.2d 283/285;
- Cobb v. C.I.R.*, 185 F. 2d 255;
- Commissioner v. Culbertson*, 337 U.S. 733, 93 L. Ed. 1661;
- Dorsey Estate v. C.I.R.*, 214 F. 2d 294/299;
- Eisenberg v. Smith*, 263 F. 2d 827;
- Finlen v. Healy*, 187 F. Supp. 434;
- First Sec. Bank v. U.S.*, 213 F. Supp. 372 (affirmed; 9th Cir. June 5, 1964);
- Funai v. C.I.R.*, 181 F. 2d 390;
- Ginsberg v. Arnold*, 185 F. 2d 913;
- Greenberger v. C.I.R.*, 177 F. 2d 990;
- Henslee v. Whitson*, 200 F. 2d 538, 540;
- Jones v. Baker*, 189 F. 2d 842;
- Jones v. Trapp*, 186 F. 2d 951;
- Lamb v. Smith*, 183 F. 2d 938;

Larson v. Robinson, 136 F. Supp. 469, 472;
Marcus v. C.I.R., 201 F. 2d 850;
Neil v. C.I.R., 26 F. 2d 563;
Nicholas v. Davis, 204 F. 2d 200;
Norton v. Jones, 97 F. Supp. 500;
Parker v. Westover, 221 F. 2d 603;
Pike v. U.S., 231 F. 2d 688;
Scofield v. Davant, 218 F. 2d 486;
Seabrook v. C.I.R., 196 F. 2d 322, 328;
Sklarsky v. U.S., 153 F. Supp. 796;
Snyder v. Westover, 217 F. 2d 928;
Stanback v. C.I.R., 271 F. 2d 514;
Tomilson v. C.I.R., 199 F. 2d 674;
Vaughn v. Carey, 88 F. Supp. 967, 969;
Visintainer v. C.I.R., 187 F. 2d 519;
Walberg v. Smyth, 142 F. Supp. 293;
Weizer v. C.I.R., 165 F. 2d 772;
Willard v. U.S., 89 F. Supp. 972/975;
Williamson v. U.S., 152 F. Supp. 716.

II.

THERE IS NO BASIS FOR RE-ALLOCATION.

The Government seeks to apply re-allocation principles based upon the theory that the children contributed neither capital nor services to the 1956 and 1957 partnerships. The Government's statement on page 5 of its brief: "The partnership acquired no interest in the land, trees and other improvements which made up the taxpayers' ranch or in the equip-

ment necessary for its operation, as these assets were retained by taxpayers" is shading the truth. The father and mother retained only the bare legal title to the lands, trees and equipment; and 50% of the right of use, occupancy, control, possession and enjoyment of these assets had been irrevocably divested as to the 1956 partnership and was subject to a right of use pursuant to a rental agreement in 1957.

The Government's statement: "The partnership did not pay any rent in 1956 for these assets" is true and correct. It is the uncontradicted evidence that the father and mother received 50% of the *net* profits for the calendar year 1956. This raises the justifiable inference that the mother in 1956 received 25% of the *net* profits in lieu of rent for that year. This inference is further supported by the record because when the 1957 ranch operations are considered, we note, without contradiction that the mother is no longer a partner. In place of her 25% share of net profits there was a rental charge of 25% of *gross* profits, thus increasing the taxable income of the father and mother.

The Government's statement that neither the daughter nor the son contributed any capital to the partnership in 1956 is again unwarranted. The daughter and son having each acquired a 25% interest in and to the "crops business" contributed that 25% interest to the partnership; the "crops business" consisting of the right of use and control of the trees, lands and equipment, together with all accounts receivable of the said business and each of the children then contributed

their said 25% interest in and to the right of use, control, possession and enjoyment of the said lands, trees and equipment and the 25% interest each in and to the accounts receivable of the business during the 1956 partnership. We respectfully submit that the documents representing ownership of the lands, trees, equipment and accounts receivable could of themselves produce nothing. It is the use and control of the lands, trees and equipment and the accounts receivable of the business which produce either profit or loss. These are rights of substantial economic value. The accounts receivable of the business at the time of the creation of the partnership on September 17, 1955 were in the sum of \$70,640.48. It is thus apparent that each child in contributing his interest in the account receivable in effect made a capital contribution to the partnership of \$17,460.12 each, and that this \$17,460.12 contributed by the son and the daughter was commingled with and was actually used in the operation of the ranch. Their contributions, therefore, were of a definite economic value to the partnership.

When the Rosenberg Bros. account receivable in the amount of \$70,640.48 was received it was merely a substitution of one capital asset for another capital asset, to-wit, cash, and which cash was (without contradiction and beyond the shadow of a doubt) promptly used in connection with 1956 partnership expenditures. The Government frankly concedes that a gift may be valid so as to relieve the donor from liability of income tax from subsequently accrued income although it was made for the purpose of re-

ducing the donor's income tax. In "Partner and Partnership—Income and Tax"—Barrett & Sego, Vol. 1, page 177, it is stated:

"Tangible personal property that is owned by a partner may be used by the partnership but without such property thereby becoming partnership property." (This is the exact situation before the Court insofar as the ownership of the almond trees, farm machinery and the land are concerned.)

"The rule with respect to intangible personal property is virtually the same as quoted next above but with this exception—if *such property is of a nature whereby it is consumed or used up and if the proceeds are placed to the same account it may more readily be said to be partnership property.*"

Of further interest in this matter is the case of *Sklsrsky v. The United States*, 153 F. Supp. 796. This is a case wherein the Government was contending for a re-allocation. The Court in rejecting the Government's contentions stated:

"If it were our function or that of the Commissioner of Internal Revenue, to reform the partnership agreements so that they would more exactly attribute income to the partners on the basis of the profit-making capacity of their contributions of capital or services, this might well be a suitable case for doing that. But the function of the Commissioner of Internal Revenue, and of ourselves, is much more limited. It is only to determine, from all the evidence, whether these were real partnerships, or only pretended ones."

In conclusion we respectfully assert that the United States District Court did not err in finding valid partnerships for the years 1956 and 1957 and that there is no basis or foundation whatsoever for re-allocation of income as urged by the Government.

CONCLUSION

It is evident that the record overwhelmingly supports the Court's finding that there were valid family partnerships for the calendar years 1956 and 1957. It is likewise clearly supported by the record that the children did have a capital interest in the assets of the partnership, to-wit, their 25% interest each in and to the "crops business" which included the right to the use, control and enjoyment of the lands, trees and equipment, together with their interest in the Rosenberg Bros. account receivable which was a capital asset of the "crops business". This capital contribution together with the services precludes any re-allocation under Section 704(e) of the Internal Revenue Code.

This brief being bifurcated we will now proceed with Section II of the brief which constitutes the cross-appellants' points on appeal.

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Citations: See Table of Authorities, Section I, this brief.	

¹We have omitted in this index to Section II matters pertaining to "Opinion Below"; "Jurisdiction"; and "Statutes and Regulations Involved" for the reason these subjects have already been dealt with in Section I of the brief.

“rent”, in face of the uncontradicted evidence that the partners had definitely agreed that no rent was to be paid to appellees for the calendar year 1956. To the contrary, the appellees and their son and daughter had agreed that Mary S. Ramos would receive a 25% share of the net income for 1956 in lieu of rent.

STATEMENT

Inasmuch as this is a bifurcated brief and the questions presented in this section of the brief are inter-related with questions and argument set forth in Section I in appellees and cross-appellants' reply brief and arguments therein, we will endeavor to avoid as much repetition as possible. For a statement herein we respectfully refer this Court to appellees and cross-appellants' statement commencing on page 7 of Section I of their reply brief.

SUMMARY OF ARGUMENT

The resolution of the questions presented herein involve the matter of the determination of the following facts:

(1) The nature and extent of the interest in the ranching business which was given to the son and daughter on the occasion of the twenty-first birthday of the son, Joe S. Ramos, on September 17, 1955, particularly the matter of the \$70,640.48 account receivable paid in 1956 by Rosenberg Bros.

(2) The partners having specifically agreed that the 1956 partnership would not pay any rent and that the father and mother would each take a 25% share of the net income in lieu of a rental payment, the District Court erred in finding and concluding that the partnership should be surcharged with 25% of its gross income as an alternative to re-allocation and that Joe R. Ramos and Mary S. Ramos, the father and mother, were chargeable with income tax on such rental allocation.

ARGUMENT

I.

THE ROSENBERG BROS. ACCOUNT RECEIVABLE.

The uncontradicted evidence on the matter of the gift to the son and daughter, as stated by the father is found at II-R. 63 commencing with line 20 and ending with line 17, page 64:

“Q. At the time that you were talking about the formation of the partnership, or the company that you told me about here—and directing your attention to your son’s birthday in September of 1955, his 21st birthday—what was your intention with reference to money that would come in from the balance of the 1955 Rosenberg crop?

A. To use it in '56 as I go along, you know, always do that.

Q. Was it to be used as part of the new company that you were forming?

A. Yes. You need it, as a matter of fact, to run a company anyhow.

Q. Let us ask you this: At the time that you formed this partnership, as you say, with your family, what property did you have to give them? What did you actually give to them?

A. Property?

Q. Yes.

A. I don't give no property to them. *I just give the business, the crops business but not the property, no.*

Q. You gave them an interest in the crops in the business.

A. In the crops in the business."

We now logically come to the question, what were the assets of the "crops business"? This business, of necessity, included the right to the use, control and enjoyment of the land, trees, equipment and buildings used in the operation of the almond farming operation. It is clear from the testimony of the father and the daughter that it also included the Rosenberg Bros. account receivable. The record clearly shows that this capital asset was later paid to the 1956 partnership and the account receivable asset became a cash asset used in the conduct of the 1956 ranch operation to defray its costs.

To say that the Rosenberg account receivable was not an asset of the "crops business" is like stating that the cattle in the *Culbertson* case were not a business asset because the father had operated the ranch alone and therefore at least as to the value of the animals at the date of the creation of that partnership, constituted money earned solely through the efforts of the father. The *Culbertson* case does not so hold.

This is further supported in the record by the testimony of Dolores Donaldson (II-R. 155, commencing at line 11 and ending at line 2, page 156) as follows:

“Q. Can you tell us any more of the details that were agreed upon, any of the rules of the partnership in connection with the formation of this partnership?

A. Well, it would start in 1956.

Q. What business were you going to be in?

A. Farming.

Q. On the ranch?

A. On the ranch—only on the ranch. *Whatever we took in for '56 would be income for the partnership, and whatever expenses we had, beginning January 1, would be expenses for the partnership.*

Q. Was anything else discussed?

A. No, I don't think so.

Q. Whose land would the partnership use?

A. We wouldn't own any of the land. We would just use it, but we weren't going to gain anything from the land just because we had a partnership with Dad and Mom.”

Thus the uncontradicted and unimpeached record discloses that the Rosenberg account receivable which came into existence under an agreement of sale with title to the almonds reserved until final payment, was, like the cattle in the *Culbertson* case, a business asset which was utilized in the conduct of the partnership business.

It is an undeniable fact from the record that the Rosenberg Bros. account receivable was a vital and material part of the “crops business.”

II.

1956 RENT ALLOCATION.

The trial Judge concluded that because the 1957 partnership paid rent in an amount equal to 25% of its gross receipts, the 1956 partnership should therefore be surcharged with rent in a similar percentage; there is *no* basis for this in the record. The combined 50% interest of the father and mother was agreed upon because NO RENT was to be paid.

Dolores Donaldson testified on the question of rent as follows (II-R. 156, lines 3 to 11, and 156, line 24 to line 9, 157):

“Q. Was the partnership going to pay any rent?

A. No.

Q. For either the land or the trees or the equipment?

A. No.

Q. Was that discussed and agreed upon?

A. Yes.

Q. Everybody understood it?

A. Oh, yes.

The Court: You already testified that there was no rent to be paid?

The Witness: Yes.

The Court: Tell us as much as you recall of the conversation on that subject.

The Witness: We weren't going to pay any rent, but we were going to operate the ranch and we weren't going to take any ownership of the land just because we had a partnership.

The Court: Was that actually discussed?

The Witness: Yes.”

The 1956 partnership *paid no rent* but the net profits were divided *four* ways. The 1957 partnership *paid rent* but the net profits were divided *three* ways and the mother's 25% share of net profits eliminated. It is clearly inferable from the record that the mother's 25% share in 1956 was in lieu of a rental charge (II-R. 162, lines 8 through 25):

“Q. And was that a period of time shortly after—Well, do you know when Mr. Franzman first started talking about having something in writing?

A. In 1956.

Q. And was that done?

A. Yes.

Q. To commence when?

A. 1957.

Q. Were any changes made?

A. Yes.

Q. Will you state what they were, as you recall?

A. *Well, we decided that actually we should just have my dad and my brother and I as partners and not my mother, and that we should pay a rental fee for the use of the property, which would be 25% as an expense, rental expense.*

Then we thought that the shares would be $33\frac{1}{3}$ to my father and my brother and myself.”

The 1957 agreement increased the taxable income to the parents from 50% of net income to 25% of gross income plus $\frac{1}{3}$ of the net profits. However, this increase of the parents' share in 1957 is not a basis for allocation on a “rental theory” in the year 1956.

Here clearly all members of the Ramos family are doing their utmost to be fair and just in their family dealing. The parents are not trying to gain advantage over the children nor the children over the parents.

CONCLUSION

The record in this case undeniably supports the gift to the children of a 25% interest each in the "crops business." The "Rosenberg Account Receivable" was an asset of the "crops business". As a part of a business interest it was transferred to the children who became the owners thereof and constituted an interest in the assets of the partnership which is distributable to the owner of the capital interest upon his withdrawal from the partnership or upon liquidation of the partnership.

The 25% interest of the mother in the 1956 partnership was a distributive share in lieu of rent and the surcharge of 25% of the 1956 partnership gross income as rent is error, either as a rental payment or as a "re-allocation of income."

In concluding this bifurcated brief we assert:

1. That there is abundant, substantial and sufficient evidence to sustain the Court's findings and conclusions that valid partnerships were in existence during the calendar years 1956 and 1957.

2. That there is no basis for any re-allocation of income.

3. That the Rosenberg account receivable was a proper asset of the 1956 crops business and partnership.

4. The Court erred in surcharging the 1956 partnership with 25% of the gross receipts for that year, either as rent or as a re-allocation of income.

Dated, San Rafael, California,
October 17, 1967.

JASPER C. DE DOBBELEER,
JEROME A. DUFFY,
*Attorneys for Appellees
and Cross-Appellants.*

CERTIFICATE

We certify that, in connection with the preparation of this brief, we have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

Dated, San Rafael, California,
October 17, 1967.

JASPER C. DE DOBBELEER,
JEROME A. DUFFY.



**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

JOE R. RAMOS AND MARY RAMOS, APPELLEES

JOE R. RAMOS AND MARY RAMOS, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

**On Appeals from the Judgment of the United States District
Court for the Northern District of California**

**BRIEF FOR THE UNITED STATES AS APPELLEE AND
REPLY BRIEF FOR THE UNITED STATES
AS APPELLANT**

FILED

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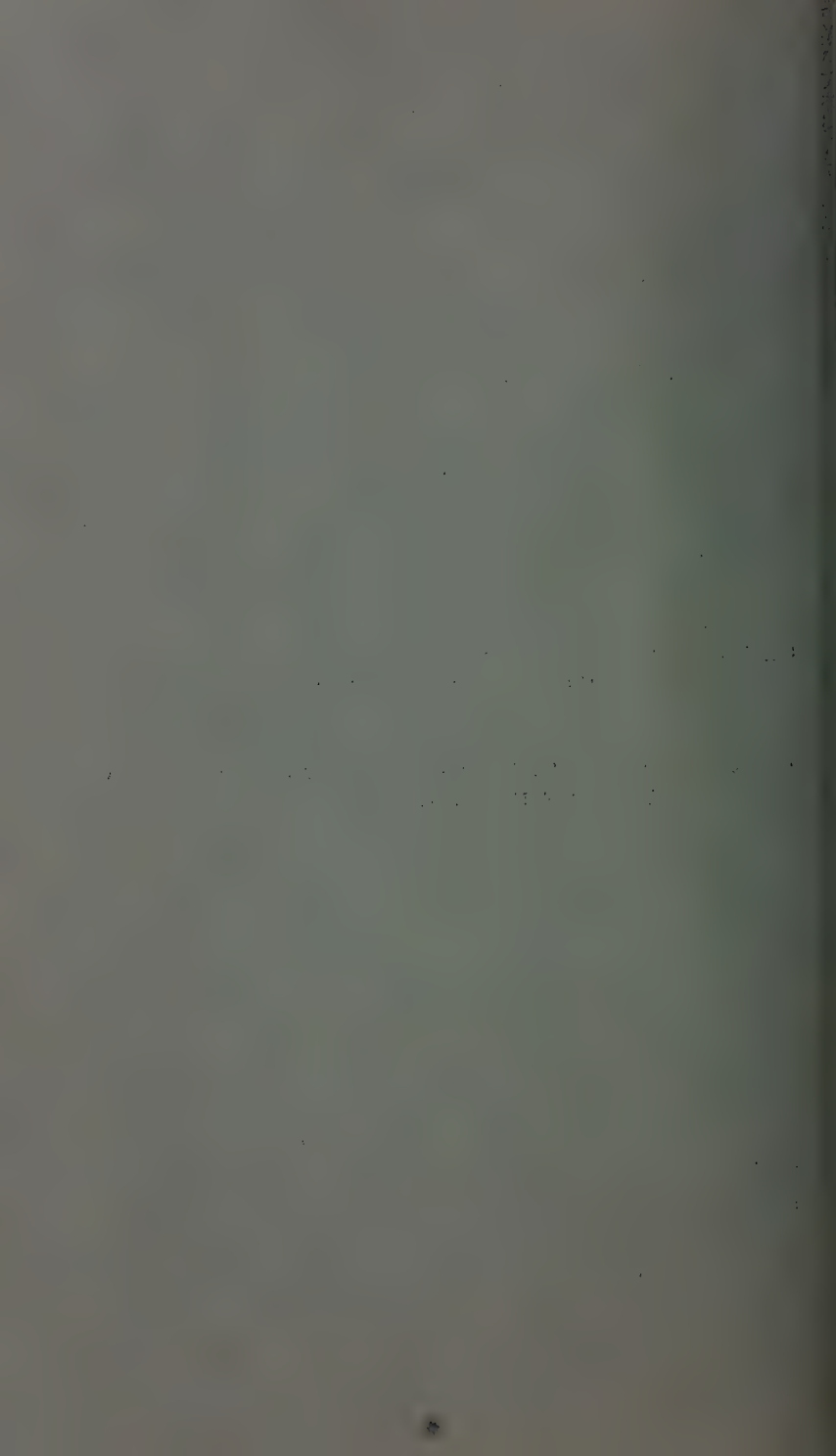
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 21824

UNITED STATES OF AMERICA, APPELLANT

v.

JOE R. RAMOS AND MARY RAMOS, APPELLEES

No. 21824-A

JOE R. RAMOS AND MARY RAMOS, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

**On Appeals from the Judgment of the United States District
Court for the Northern District of California**

**BRIEF FOR THE UNITED STATES AS APPELLEE AND
REPLY BRIEF FOR THE UNITED STATES
AS APPELLANT**

QUESTIONS PRESENTED BY TAXPAYERS' APPEAL ¹

1. Whether, assuming that there was a valid family partnership during the year 1956, the District

¹ Since the opinion below and the jurisdictional statement have been set out in our brief as appellant, they will not be repeated here.

Court erred in holding that the sum of \$70,640.48 received in the year 1956 for crops sold during the calendar year 1955 was taxable to taxpayers and not to the members of the alleged 1956 partnership.

2. Whether, assuming that a valid family partnership existed during the year 1956, the District Court erred in allocating 25 percent of the partnership's crop receipts for 1956 to taxpayers for the use by the partnership of the land, trees and equipment which made up the Ramos Home Ranch and which were owned by taxpayers.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and Regulations involved are contained in Appendix A to the opening brief for the Government.

STATEMENT

The findings and conclusions of the District Court concerning the taxpayers' appeal (I-R. 67-68) may be summarized as follows:

In 1956, the Ramos family partnership reported as part of its gross income the sum of \$70,640.48 received for almonds which were raised on taxpayers' ranch and were sold in 1955, before the partnership was to become operative. The United States contended below that the \$70,640.48 received in 1956 was earned by and taxable only to taxpayers. The District Court, holding for the Government on this point, stated that the \$70,640.48, though received in 1956 by the partnership, "represented income earned ex-

clusively by the plaintiffs [taxpayers] and generated by their services and by property owned and controlled by them.” (I-R. 68.) The court reasoned that taxpayers, having earned the \$70,640.48 for the crops sold in 1955, could not defeat or avoid their tax liability by assigning the account receivable to the 1956 partnership. (I-R. 68.) From this holding, taxpayers appealed.² (I-R. 91.)

The 1956 partnership had the use of taxpayers’ land, trees and equipment in the production and harvesting of the crops during that year and paid no rent therefor. (II-R. 20-21, 155-156, 483, 487-488.) The Government argued below that if a valid partnership was found to have existed during the year 1956, then, the land, trees and equipment should be considered as having been contributed by taxpayers to the capital of the partnership and would thereby be a determining factor in allocating the distributive shares of the partnership income among the partners in relation to the contribution of capital and services which each made to the partnership. The District Court rejected the contention of the Government that the land, trees and equipment were to be treated as if contributed to the capital of the partnership, but did, however, hold that the income of the 1956 part-

² Likewise, the District Court held that income in the amount of \$157,088.71 reported by the 1957 partnership as part of its gross income and which was received in 1957 for almonds and peaches raised, sold and delivered to the buyer by the 1956 partnership was income earned by and taxable to the members of the 1956 partnership and not to the members of the 1957 partnership. (I-R. 68.) Taxpayers did not appeal from this holding.

nership had to be corrected by allocating to taxpayers a reasonable rental value for the use by the partnership of the land, trees and equipment. (I-R. 52.) The District Court found that the reasonable rental value for the land, trees and equipment, as expressed in an agreement between the 1957 partnership and taxpayers, was twenty-five percent of the crop income. (I-R. 69.) Accordingly, the court found that the reasonable rental value for 1956 was \$37,500. (I-R. 73.) From this finding, both the Government and taxpayers appealed (I-R. 88-89, 91-92), the Government urging that the land, trees and equipment should have been considered to have been contributed to the capital of the partnership and taxpayers claiming that no rent whatsoever should have been charged to the partnership for its use of the land, trees and equipment in 1956.

SUMMARY OF ARGUMENT

1. Taxpayers argue that the sum of \$70,640.48 received in 1956 for almonds which were raised on taxpayers' ranch and were sold in 1955 is taxable to the members of the alleged 1956 partnership. The sum in question, however, represented income earned exclusively by taxpayers and was generated by their services and by property owned and controlled by them. And, it is at this time axiomatic that the basic concept of income taxation—that the income from service rendered is taxable to the person who renders the service and that income from property is taxed to the person who owns or controls the property—can-

not be defeated by a transfer or assignment to another. *Helvering v. Horst*, 311 U.S. 112; *Lucas v. Earl*, 281 U.S. 111; *Helvering v. Eubank*, 311 U.S. 122.

2. Taxpayers, in addition, argue that no part of the 1956 partnership income should be allocated to them for the use by the partnership of the land, trees and equipment comprising the Ramos Home Ranch. The Government, on the other hand, contends that these assets should be treated as if they had been contributed to the partnership by the taxpayers. To so treat the assets is supported by the fact that the economic effect of allowing the partnership the use of the assets without requiring any compensation therefor is the same as if they had been contributed to the partnership. And, as Section 704(e) (2) of the 1954 Code provides that the distributive share of a member of a family partnership whose interest was acquired by gift or purchase from another family member shall be determined by the partnership agreement "except to the extent that the portion of such share attributable to donated capital is proportionately greater than the share of the donor attributable to the donor's capital", a reallocation of the income of the 1956 partnership should be made so as to properly credit taxpayers with the income earned through the use of land, trees and equipment contributed by them to the partnership.

ARGUMENT

I

The District Court Correctly Held That the Sum of \$70,640.48 Received In the Year 1956 Was Taxable to Taxpayers and Not to the Members of the Alleged Partnership

The question presented by taxpayers' argument that the 1956 partnership (and not they themselves) is accountable for the \$70,640.48 received in 1956 is whether one who is presently entitled to receive income and who is taxable only on receipt of payment can escape taxation by giving away his right thereto in advance of actual payment. As recognized by the District Court (I-R. 68), it is at this time axiomatic that the basic concept of income taxation—that the income from service is taxable to the person who renders the service and that income from property is taxed to the person who owns or controls the property—cannot be defeated by a transfer or assignment to another before the income is realized. *Helvering v. Horst*, 311 U.S. 112; *Lucas v. Earl*, 281 U.S. 111; *Helvering v. Eubank*, 311 U.S. 122.

The doctrine of anticipatory assignment of income is frequently stated in terms of the metaphor of Mr. Justice Holmes in *Lucas v. Earl*, *supra* (p. 115) that "no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew." This is more than a graphic figure of speech; rather it is a statement of the doctrine that earned income is to be taxed to the one who earns it. See 2

Mertens, Law of Federal Income Taxation, 1961 rev., Sec. 18.02. Thus, in *Lucas v. Earl*, *supra*, an attorney remained taxable on salaries and fees earned by him in spite of a prior, binding agreement whereby those salaries and fees were owned in joint tenancy with his wife; in *Helvering v. Horst*, *supra*, a father who owned a coupon bond was taxable on interest received by his son even though he had detached the interest coupons and had given them to the son before they matured; and in *Helvering v. Eubank*, *supra*, the taxpayer, a former insurance agent who had validly assigned to a third party his right to certain renewal commissions which were to be paid without the rendition of any further service, was held taxable on the renewal commissions in subsequent years when they were received by the assignee.

This Court has held likewise. In *Commissioner v. Fender Sales, Inc.*, 338 F. 2d 924, certiorari denied, 382 U.S. 813, the Court stated (p. 929):

But, in *Horst*, the Supreme Court relied on the broader concept of "realization of income" rather than a restricted notion of actual payment for its conclusions, and we think it necessary and logical, in the just administration of the tax laws, that the Courts continue to recognize that a taxpayer may realize the income represented by an account receivable by exercising his rights of control and disposition of it for his economic benefit in ways other than receipt of payment in money. In *Commissioner of Internal Revenue v. Lester*, 1961, 366 U.S. 299, 304, 81 S. Ct. 1343, 1346, 6 L. Ed. 2d 306, the Supreme Court approvingly quoted from *Horst*: "The power to dis-

pose of income is the equivalent of ownership of it.” We add, the exercise of the power to dispose of income is the equivalent of the realization of it.

And in *United States v. Snow*, 223 F. 2d 103, certiorari denied, 350 U.S. 831, this Court had earlier stated (pp. 109-110):

It has been the rule since *Lucas v. Earl*, 281 U.S. 111, 50 S. Ct. 241, 74 L. Ed. 731, that income tax cannot be escaped by a taxpayer’s assigning to another *the right to receive ordinary income*. (Emphasis in original)

See also *Idaho First National Bank v. United States*, 265 F. 2d 6 (C.A. 9th); *Family Record Plan, Inc. v. Commissioner*, 309 F. 2d 208 (C.A. 9th), certiorari denied, 373 U.S. 910; *Daugherty v. Commissioner*, 63 F. 2d 77 (C.A. 9th); *Strauss v. Commissioner*, 168 F. 2d 441 (C.A. 2d), certiorari denied, 335 U.S. 858; *Floyd v. Scofield*, 193 F. 2d 594 (C.A. 5th); *Turnbull, Inc. v. Commissioner*, 373 F. 2d 91 (C.A. 5th); *Duran v. Commissioner*, 123 F. 2d 324 (C.A. 10th); *Williamson v. United States*, 292 F. 2d 524 (Ct. Cl.).

Taxpayers’ argument (Br. 44-45) that the account receivable represented “a business asset which was utilized in the conduct of the partnership business” and should therefore not be taxable to taxpayers, is without merit. Whether the account receivable is or is not an asset of the “crops business” is not here in question—nor does the resolution of that question affect the taxability of such income to taxpayers whose service and capital in 1955 created the income now

represented by the account receivable.³ Taxpayers have enjoyed the economic gain represented by their right to receive income from the account receivable even though they did not receive payment of it from their obligor. The enjoyment of their economic gain was fully consummated when they made such use of their power to receive or control the income or to procure in its stead some other satisfaction which has economic value. The power to dispose of income is tantamount to ownership of it, and the exercise of that power in procuring payment to the partnership was the equivalent of the enjoyment of the income on the part of the taxpayers who exercised the right. *Helvering v. Horst, supra*; *Helvering v. Eubank, supra*. Thus, for income tax purposes the situation was the same as though their debtor had paid the sum in question to taxpayers and taxpayers had passed the sum on to the 1956 partnership. Although payment was made direct to the partnership the amount so paid represented gross income to taxpayers and is therefore taxable to them—not to the members of the alleged 1956 partnership.

³ Nowhere do taxpayers deny that it was their services and capital which created the account receivable during the year 1955.

II

Assuming Arguendo That a Valid Family Partnership Existed During the Year 1956, Then, for the Purpose of Allocating Partnership Income for That Year, the Land, Trees and Equipment Used by the Partnership Must Be Treated as if They Had been Contributed to the Partnership by Taxpayers

If the partnership for 1956 is recognized as being valid, then, the Government contends, as set out in detail in its opening brief, pp. 46-48, that the land, trees and equipment which comprised the Ramos Home Ranch must be treated as if they had been contributed to the partnership by taxpayers for the purpose of allocating the partnership income for that year among the partners. To treat the land, trees and equipment as having been rented to the partnership, as did the District Court (I-R. 69), is not supported by the evidence. The record evidence shows that no arrangements were made by the 1956 partnership to pay taxpayers any rent for the use of these assets. To treat the assets, for the purpose of allocating partnership income, as if they had been contributed to the partnership is, however, supported by the fact that the economic effect of allowing the partnership the use of the assets without requiring any compensation therefor is the same as if they had been contributed to the partnership.⁴

⁴ It is to be noted that in preparing the partnership federal income tax return for 1956 taxpayers' accountant, George Franzman, took a deduction for depreciation on the equipment used in the operation of the Ramos Home Ranch. (II-R. 490-491.)

By allocating to taxpayers an amount which it felt was a reasonable rental allowance for the use of the ranch's operating assets, the District Court has held that a reasonable rental allowance is a proper substitute, to protect against improper income-shifting within a family group by use of a family partnership, for the protection which Congress devised in Section 704(e) (2) of requiring the allocation of income based upon the capital contribution of each of the partners. Moreover, there is no factual basis on which to support the court's finding that 25 percent of the crop receipts was a reasonable rental. The only mention of this percentage as "rent" appears in the rental agreement which was to be for a period subsequent to the 1956 crop year and there is no indication that the rental agreement for that period was arrived at as the result of arm's-length bargaining. Thus, the Government submits that the lower court's holding that only 25 percent of the partnership's crop receipts should be credited to taxpayers for the use of the land, trees and equipment is erroneous.

Taxpayers' argument (Br. 46-48) that no part of the 1956 partnership income should be allocated to taxpayers for the use by the partnership of the land, trees and equipment comprising the Ramos Home Ranch, is, as has already been fully discussed in the Government's opening brief, without any merit whatsoever. For, as stated in the Government's opening brief, pp. 22-25, 44, Congress attempted by Sec. 340 of the Revenue Act of 1951, c. 521, 65 Stat. 452 (adding Section 191 and amending Section 3797 of the Internal Revenue Code of 1939), to bring the taxation

of "family partnerships" into line with the fundamental principles generally applied in taxing income from property and services. However, because of the possibility of distorting income by a literal application of the objective test there established, Congress also imposed certain limitations on the recognition of otherwise valid partnership agreements insofar as allocation of income was concerned. As stated in H. Rep. No. 82nd Cong., 1st Sess. pp. 33-34 (1951-2 Cum. Bull. 357, 381):

Since legislation is now necessary to make clear the fundamental principle that, where there is a real transfer of ownership, a gift of a family partnership interest is to be respected for tax purposes without regard to the motives which actuated the transfer, it is considered appropriate at the same time to provide specific safeguards—whether or not such safeguards may be inherent in the general rule—against the use of the partnership device to accomplish the deflection of income from the real owner.

Therefor the bill provides that in the case of any partnership interest created by gift the allocation of income according to the terms of the partnership agreement shall be controlling for income tax purposes except when the shares are allocated without proper allowance of reasonable compensation for services rendered to the partnership by the donor, and except to the extent that the allocation to the donated capital is proportionately greater than that attributable to the donor's capital. In such cases a reasonable allowance will be made for the services rendered by the partners, and the balance of the income

will be allocated according to the amount of capital which the several partners have invested.

These same limitations are now contained in Section 704(e) (2) of the 1954 Code (Appendix A to the opening brief for the Government) which provides that the distributive share of a member of a family partnership whose interest was acquired by gift or purchase from another family member shall be determined by the partnership agreement "except to the extent that such share is determined without allowance of reasonable compensation for services rendered to the partnership by the donor, and except to the extent that the portion of such share attributable to donated capital is proportionately greater than the share of the donor attributable to the donor's capital." See also Treasury Regulations on Income Tax (1954 Code), Section 1.704-1 (e) (3) (Appendix A to the opening brief for the Government). Thus, to adopt the argument of taxpayers would be contrary to the limitations imposed by Section 704 on the determination of the distributive shares of the members of a family partnership and the Government urges this Court to reject such an argument.⁵

⁵ If, however, this Court should disagree with our contention that the assets in question should be treated as a capital contribution by taxpayers within the meaning of Section 704(e) (2) of the Code, then we submit that it would be appropriate to remand the case for determination of a reasonable rental, since the partnership unquestionably had the use of the assets and the arbitrary allowance made by the District Court does not adequately reflect the value of such use.

218 F. 2d 380, 383 (C.A. 9th)), have been forced to rely on what appears to be a fabrication in order to attempt to show that their children contributed capital to the partnership. Accordingly, taxpayers state (Br. 36-37):

The daughter and son having each acquired a 25% interest in and to the "crops business" contributed that 25% interest to the partnership; the "crops business" consisting of the right to use and control of the trees, lands, and equipment, together with all accounts receivable of the said business and each of the children then contributed their said 25% interest in and to the rights of use, control, possession and enjoyment of the said lands, trees and equipment and the 25% interest each in and to the accounts receivable of the business during the 1956 partnership.

Nowhere do taxpayers point to any evidence to sustain their strained argument. Rather, that testimony which taxpayers rely on in an earlier part of their brief (Br. 15-16) clearly shows that taxpayers' children merely received an anticipatory assignment of income from their parents' farming operation. For, on cross-examination, taxpayers' daughter testified as follows (II-R. 301-302):

Q. What was your interest? You didn't own land, did you, Mrs. Donaldson, or any interest in the land?

A. No, we don't own the land.

her part time bookkeeping duties and was paid therefor (II-R. 188, 287).

Q. You don't own any interest in the machinery?

A. No.

Q. There was no cash capital put into the partnership in '56?

A. No.

Q. Well, what was your twenty-five per cent interest in 1956?

A. In the partnership agreement. When we formed it we were going to be partners, were going to be a family partnership, all together, and whatever income we made we would share.

If we had losses, we would share them and we would pay our expenses, and whatever was left we would share twenty-five per cent, my father, my mother, my brother and I. I don't think you have to own land to have a share in anything.

Q. In other words, you feel you can participate in the profits from the land without owning any portion of the land?

A. Yes.

Q. And this is the type of partnership interest that you had, just in the profits generated by the assets?

A. Profits or losses that would be produced by the almond trees on the land.

Thus, the daughter's statement reveals that the children received no interest whatsoever in the assets of the farming operation. Concomitantly, they were thus unable to contribute to the partnership that which they themselves did not have. Taxpayers having retained complete interest in the operating assets of their ranch (I-R. 63), the income generated there-

from is taxable to them.⁸ *Kuney v. Frank*, 308 F. 2d 719 (C.A. 9th); *Sellers v. Commissioner*, *supra*.

Respectfully submitted,

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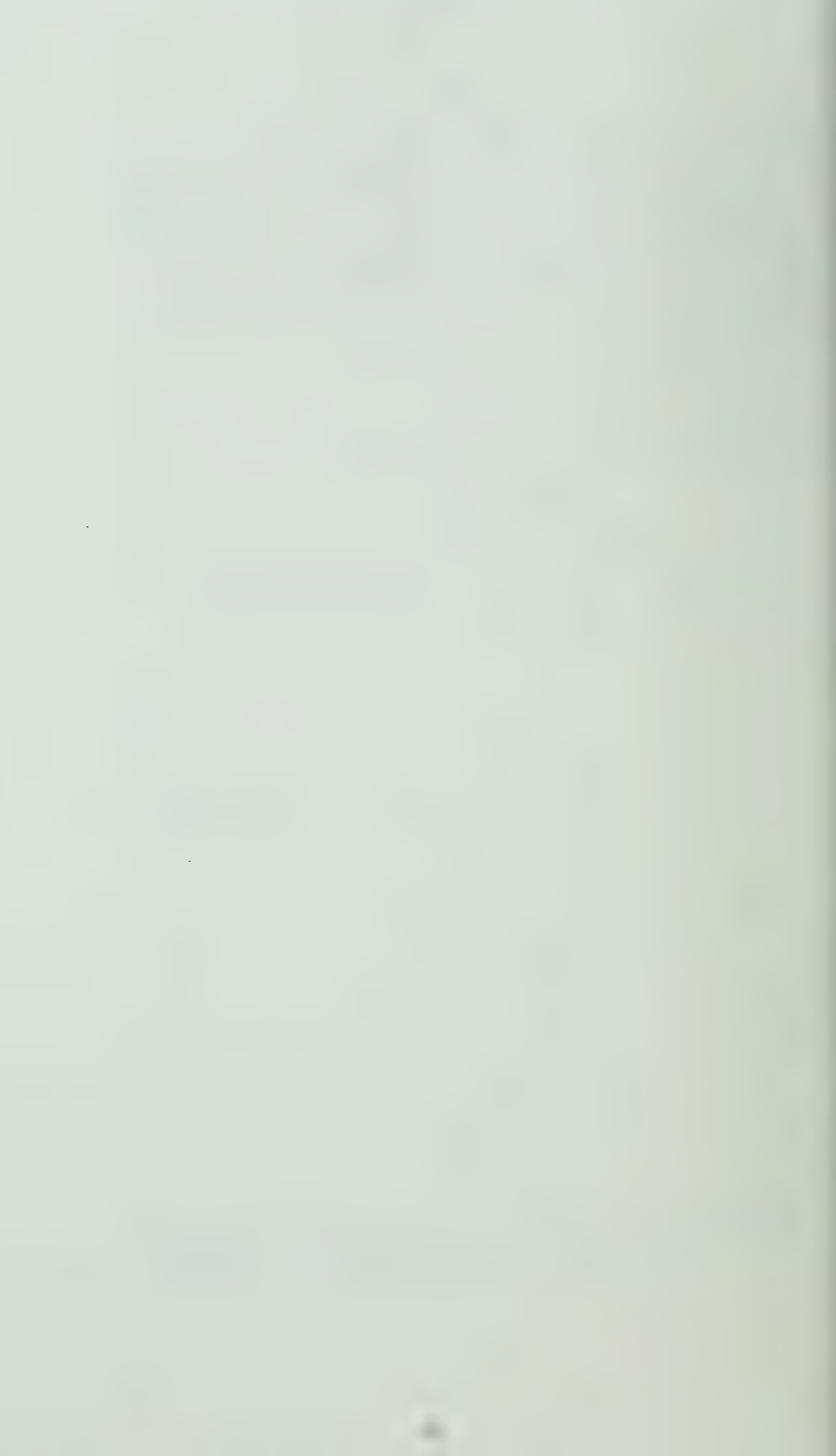
⁸ See the statement of George Franzman, taxpayers account, that all the income of the partnership was earned through the land and the trees thereon. (II-R. 533.)

CERTIFICATE

I certify that, in connection with the preparation of these briefs, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing briefs are in full compliance with those rules.

Dated: day of November, 1967.

STEPHEN H. PALEY
Attorney



Nos. 21,824 and 21,824-A
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant and Cross-Appellee,
VS.
JOE R. RAMOS and MARY RAMOS,
Appellees and Cross-Appellants.

On Appeal from the Judgment of the
United States District Court for the
Northern District of California

REPLY BRIEF OF APPELLANTS-TAXPAYERS
TO BRIEF OF UNITED STATES AS CROSS-APPELLEE
and
BRIEF FOR APPELLEES IN REPLY TO
BRIEF OF UNITED STATES AS APPELLANT

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DEC 12 1967

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Nos. 21,824 and 21,824-A

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA, <i>Appellant and Cross-Appellee,</i> VS. JOE R. RAMOS and MARY RAMOS, <i>Appellees and Cross-Appellants.</i>	}
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On Appeal from the Judgment of the
United States District Court for the
Northern District of California

**REPLY BRIEF OF APPELLANTS-TAXPAYERS
TO BRIEF OF UNITED STATES AS CROSS-APPELLEE**

QUESTIONS PRESENTED BY TAXPAYERS' APPEAL.

The questions as presented by the taxpayers' appeal have been set forth in taxpayers' brief commencing at page 41 under the heading "QUESTIONS PRESENTED" and contained in Section II of the brief for cross-appellants.

STATUTE AND REGULATIONS INVOLVED.

The pertinent provisions of the statute and regulations involved are contained in Appendix A of the opening brief of the Government.

STATEMENT.

In 1956 the Ramos family partnership included in and reported as part of its gross income the sum of \$70,640.48 received for almonds which were raised on taxpayers' ranch and which were subject to an agreement of sale entered into in 1955 prior to the time of the harvest of said crop, but which were delivered to buyers after the creation of the partnership on September 19, 1955. The said partnership was to become operative on January 1, 1956. However, it is to be borne in mind that at the time of the creation of the partnership in September of 1955, it was agreed between the members of the partnership that all money received in 1956 as a result of the "crops business" regardless of whether from the sale of the 1955 crop or otherwise, would be considered as belonging to the partnership business and used as such. In other words, the Rosenberg account receivable was part and parcel of the "crops business" and was part of the assets of the "crops business" transferred to the children at the time of the creation of the 1956 partnership on September 19, 1955. The court below held that the \$70,640.48 was taxable to taxpayer-appellants, from which holding taxpayers have appealed. (I.R. 91.)

The Government frankly concedes on page 3 of their reply brief, as follows:

"The 1956 partnership had the use of taxpayers' land, trees and equipment in the production and harvesting of the crops during that year and paid no rent therefor."

Taxpayers argued below and herein reiterate their contention that the right to the use of lands, trees and equipment, was given to taxpayers' children at the time of the creation of the 1956 partnership, to wit, September 19, 1955. The uncontradicted and undenied testimony is that the children were each given a 25% interest in the "crops business". Neither taxpayers nor taxpayers' children contend that the children received an ownership interest or title to the lands, trees or equipment. The children received this 25% interest in and to the "crops business" as the result of a promise and understanding made by taxpayers to their children many many years before, to wit, that upon Joe S. Ramos attaining the age of 21 years they would be taken into the operation of the "crops business" as partners. The interest in the "crops business" given to the children was undeniably a working interest. The Government has never denied or contradicted taxpayers' contention that the 25% interest in the net proceeds of the 1956 partnership which was paid to Mary Ramos was a share to taxpayers in lieu of rent. Arguendo, if there is any question on this point perhaps it should be remanded for further testimony on this fact. The trial court thus not only erred in failing to credit taxpayers with the receipt of 25% of net profits for the year 1956 as a payment for use of assets retained by taxpayers, but likewise erred in surcharging taxpayers with a 25% of the gross receipts, as and for rent. In determining that taxpayers should be charged with 25% of the gross receipts, the court below further erred in

not recognizing the capital contributions of the children. The trial court did not give the children credit for their capital contributions to the partnership consisting of the 25% interest each in and to the Rosenberg account receivable or the 25% interest each in and to the right of use of the lands, trees and equipment. From the finding that 25% of the gross income of the 1956 partnership should be allocated to taxpayers as rent, both the Government and taxpayers have appealed.

SUMMARY OF ARGUMENT.

1. The Government contends that the \$70,640.48 received in 1956 is taxable solely to taxpayers. Taxpayers contend that the said sum was an account receivable in existence at the time of the creation of the 1956 partnership, although the exact dollar and cent amount of said account was indeterminate at that time for the reason that the sales agreement called for a payment on a per pound basis on delivery and the 1955 crop was not delivered until after the formation of the 1956 partnership. Taxpayers further contend that a 50% interest in said account receivable was irrevocably transferred and given to taxpayers' children at the time of the creation of the 1956 partnership and that the interest in the accounts receivable is nothing more or less than an interest in almonds or other assets of the "crops business" and is comparable to the cattle on the hoof which is the subject of a gift to the children in the *Culbertson* case.

2. Taxpayers further argue that even though the sum of \$70,640.48 should be found taxable to taxpayers as part of taxpayers' income, that nevertheless, the said sum can be and was the subject of a gift to the children as a part of the gift of the "crops business" at the time of the creation of the partnership, to wit, September 19, 1955, and in turn was a part of the capital contribution of the children to the 1956 partnership.

3. The Government contends that the children contributed no capital or assets and performed little or no services to the 1956 partnership and argues, therefore, that the provisions of the Internal Revenue Code empowering the Commissioner to make a re-allocation of income, are operative. Taxpayers contend that their gift of a 25% interest in and to the "crops business" carried with it all the corresponding interest in and to all the rights, privileges, duties, responsibilities and assets of the "crops business", including the right to their respective shares of the profits, if any, and subjecting the members of the 1956 partnership to their respective share of losses. Taxpayers likewise argue that the 25% interest in the net profits paid to Mary Ramos in 1956 was a payment in lieu of rent and was a payment as and for the right of use of the lands, trees and equipment, and assets retained by taxpayers. Taxpayers further contend that the mere ownership of the documents evidencing legal title to the lands, trees and equipment in and of itself is of little economic value and that it is the *right of use, and use, control and possession of the economic assets of*

the “crops business”* that is productive of economic values, and that this right is the only capital factor to be considered under the provisions of Section 704 (e)(1) of the 1954 Code, and that under the said Code it is immaterial whether this interest was acquired by purchase or *gift* from other members of the family.

ARGUMENT.

I.

The District Court incorrectly found that the sum of \$70,640.48 received in the year 1956 was taxable to taxpayers alone and not to the members of the 1956 partnership.

Taxpayers assert that in the cases cited by the Government in support of its assignment contention, the assignee or donee of the allegedly assigned interest, had the full, free, exclusive and uninterrupted use and control of the assigned interest. In the instant case the Rosenberg account receivable was merely one of the assets belonging to the “crops business”, a part of which business was transferred in respective shares to the children on September 19, 1955. It is submitted that the facts in the instant case are very closely the facts and rationale in the case of *Blair v. Commissioner*, 300 U.S. 5. It is interesting to note that throughout the entire proceedings, from the court below to the present time, the Government

*Italics ours throughout unless otherwise noted.

has not at any time pointed to a sum or sums of money given to the particular assignee in such manner that such assignee had the free and exclusive power and dominion over the sum allegedly assigned. The partnership books clearly reflect the receipt and use of the Rosenberg money in its 1956 business operations. This is clearly set forth by the testimony of Joe R. Ramos, as follows:

“Q. At the time that you were talking about the formation of the partnership, or the company that you told us about here—and directing your attention to your son’s birthday in September of 1955, his 21st birthday—what was your intention with reference to money that would come in from the balance of the 1955 Rosenberg crop?

A. To use it in ’56 as I go along, you know, always do that.

Q. Was it to be used as part of the new company that you were forming?

A. Yes. You need it, as a matter of fact, to run a company anyhow.

Q. Let me ask you this: At the time that you formed this partnership, as you say, with your family, what property did you have to give them? What did you actually give to them?

A. Property?

Q. Yes.

A. I don’t give no property to them. *I just give the business*, the crops business but not the property, no.

Q. You gave them an interest in the crops in the business.

A. In the crops in the business.” (II-R. 63-64.)

It is likewise of note that the cases cited by the Government in support of its theory of the assignment of an account receivable are for the most part assignments of moneys earned or to be earned from "personal services".

The mere fact that the children received their interest in the "crops business" by gift does not enhance the Government's position that it is an assignment of income. In the case of *United States v. Atkins*, 191 F. 2d 146, the Court held that a father and his emancipated minor son recorded a formal agreement of partnership and the father contributed the partnership holdings in other companies to the partnership by the father and son as capital thereof, such partnership was a bona fide partnership and the income of the partnership distributable to the son was not taxable to the father.

It is likewise here pointed out that the profits distributed to the son and the daughter was in direct proportion to their interest in the capital account of the partnership. There can be no doubt as to the date the children acquired their interest in the "crops business." The uncontradicted testimony of Joe S. Ramos under questioning by the lower court is as follows:

"The Court: And he said he was going to take you in with him when you were 21?"

The Witness: Yes.

The Court: When did you think you were part of the business?

The Witness: When I turned 21, in September." (II-R. 426-427.)

This Court in the case of *United States v. Snow*, 223 F. 2d 103, at page 108, stated as follows:

“It is now the overwhelming weight of authority and the law of this circuit that an interest in a partnership is a capital asset.”

II.

Assuming arguendo that a valid family partnership existed during the year 1956, then (a) the 25% interest each received by the son and daughter must be treated as a capital contribution by the son and daughter to the partnership. (b) The 25% share in the partnership allocated to Mary Ramos must be treated as a further payment as and for the possession, use and enjoyment of partnership assets.

The Government in its reply brief in its footnote 5 at the bottom of page 13 contends in part the following language:

“... *the partnership unquestionably had the use of the assets* and the arbitrary allowance made by the District Court does not adequately reflect the value of such use.”

Thus, the Government by its own admission attributes capital value to the right *to use the land, trees and equipment*. The Government contends that the children had received only profits. However, the uncontradicted testimony is otherwise. At page 17 of the Government's reply brief the Government sets forth a portion of the transcript as follows:

“Q. And this is the type of partnership interest that you had, just in the profits generated by the assets?”

A. Profits or losses *that would be produced by the almond trees on the land.*"

The Government apparently takes the position that almonds and profits are showered automatically from some mythical Mt. Olympus. Such is not the case. An almond producing business is a working business. It requires years of training to acquire the necessary skill demanded for successful operation. The many years of training required for their respective jobs were rendered by the children with the oft-repeated assurance that they would be given an interest in the business. Nowhere in the testimony is there any inkling that the children had an interest only in the profits. The Government further states in its footnote 3 at page 9:

"Nowhere do taxpayers deny that it was their services and capital which created the account receivable during the year 1955."

It is submitted that the testimony of the father is as follows:

"The Court: May I ask another question?

Your son then helped you with your almond crop for 1955, didn't he?

The Witness: The crop in '55 he helped me.

The Court: He worked the whole crop with you?

The Witness: Yes, sir." (II-R. 26.)

This is further borne out by a comment of the Court, during examination of the son, as follows:

"The Court: Well, no, I can't say it doesn't bear on the issue, but I think it is pretty well

established that he was really working on that ranch." (II-R. 424.)

While the children knew that the 1955 crop would be harvested and delivered to the buyer in that year, they also knew and were well aware of the fact, from previous like experiences, that a major portion of the crop payment would be paid by the buyer in the following year, in this instance in 1956, and such payment would be after the children received an interest in the "crops business" and also after the partnership commenced its operations. The 1956 partnership was formed before the crop was harvested and delivered. The uncontradicted evidence, as shown, demonstrates that the son worked the entire 1955 crop from June through November. We have also referred to the testimony wherein it was the definite understanding that money received after January 1, 1956, from crop activities would be considered partnership money.

It is pertinent at this point to inquire what reason would the son have to work the 1955 crop when he knew that he was facing imminent military service? The testimony is clear and uncontradicted that he delayed military service until he could complete his work on the 1955 crop. Otherwise, the normal course of events would have dictated that the son would have entered the military service immediately after his graduation from college in June.

It does no violence to the record in this case to state that the children and their parents had the firm understanding and intention that the children were to share

in any moneys received in that portion of the 1955 crop which would be paid for in 1956. Therefore, with this knowledge and understanding, and the attendant background, the Government incorrectly suggests that it was the services and capital alone of taxpayers which created this account receivable.

We submit that the Government has correctly stated the situation when it used the following language in its summary of argument on page 4 of its reply brief, to wit:

“* * * income from property is taxed to the person who owns *or controls the property* * * *”.

The Government goes on and contends that this cannot be defeated by a transfer or assignment to another. The Government does not indicate whether it meant by a transfer of the property, all of the right to use and control the property or of income. Here there was no transfer or assignment of income. There was a transfer by taxpayers to their children of the property right itself. The transfer of the property to the children carried with it the income taxes attributable to the capital assets transferred to the children and the value of this capital asset is to be so treated, the Government having conceded that it has “value.” It is interesting to note that the Government has never denied that it was part of the 1956 partnership agreement that in lieu of any rental payment to taxpayer, Mary Ramos would receive a 25% interest in the net profits of the partnership. The matter of partnership rental was not directly raised during the course of

the trial below either by the taxpayers or by the Government. The 25% allocation in 1956 was solely a Court adjustment made after the close of the evidence. The Government in its many years of investigation of these partnerships, was fully aware of this problem. Arguendo, it may be stated that if there is any doubt on this question, the case should be remanded to the District Court for the determination of this issue as well as for the determination of the value of the children's interest in and to the right to use, possession and control of the "crops business" assets. We cannot think of a case or situation in which parents and their children in trying to set up a fair and proper business association, dealt more at "arm's length" than in this situation. In the 1956 partnership the mother received 25% of net profits. In 1957 after further advice on this matter from their certified public accountant, the mother's partnership share of 25% of net profits was eliminated and taxpayers get 25% of gross profits as rent, plus one-third of the net profits.

In closing, we would point out that the Government has never denied that there was a *gift* to the children. The testimony on this point as stated by the father is found at II-R. 64, when in answer to a question he stated:

"A. I don't give no property to them. I just give the business, the crops business but not the property, no."

Likewise to the same effect is the testimony of Dolores Donaldson, II-R. 156:

“Q. Whose land would the partnership use?

A. We wouldn't own any of the land. We would just use it * * *”.

The Government's further contention that allocation must be made because of services, must be viewed in the light of the testimony of the father as recorded in II-R. 104:

“The Court: Did you get paid, too?

The Witness: No, I don't. I tell you why. Because I figure if I work, if I get paid, they can force me to, and this way I just work when I feel like or really they need me bad on the ranch.”

CONCLUSION.

For the foregoing reasons that part of the decision of the District Court holding that the sum of \$70,640.48 received in 1956 and paid during the 1956 partnership, was taxable solely to taxpayers, should be determined as error. In addition, the Court erred in surcharging the taxpayers with 25% of the gross income of the 1956 partnership, either as rent or by way of allocation.

**APPELLEES' REPLY TO
BRIEF OF THE UNITED STATES AS APPELLANT**

At page 14 of its reply brief, the Government expresses surprise that the taxpayers have stated that the Government openly and frankly has conceded that the evidence supports the findings and that the partnership was in existence for the calendar years 1956 and 1957. There should be no such surprise expressed for the reason we supported the statement by the Government's own statement in its opening brief (page 3): "*The basic facts are virtually undisputed (I-R. 54)* * *.*" We maintain that this flat and unequivocal statement warrants appellees' statement. If the basic facts are virtually undisputed and the Court based its findings upon these virtually undisputed facts, we assert that the result is an open and frank concession that the evidence supports the findings and that a family partnership was in existence for the calendar years 1956 and 1957. That the District Court so understood the situation is borne out by the statement in the District Court's Memorandum and Opinions where at pages 5 and 6 it is stated: "The documentary evidence offered and received in evidence, the testimony adduced and the stipulations entered into *show no substantial factual conflict.* The record in these cases presents matters of law arising from what is in practical effect *an agreed statement of facts.*"

The only attack upon the trial court's findings is the naked *assertion* by the Government that the findings that valid family partnerships were in existence

for the calendar years 1956 and 1957 are not supported by the evidence. However, as stated, this is purely an *assertion*. Nowhere throughout the Government's brief is it pointed out *wherein* the findings are unsupported by the evidence or that the findings are against the evidence.

Appellees have pointed out in their brief wherein there is an overwhelming abundance of evidence in support of the findings of fact. We would not go to the length of saying that a substantial part of the Government's appeal is "frivolous and moot" because of its complete failure to point out to this Court wherein in the record there is lack of substantial evidence to sustain the findings. We do, however, earnestly assert and contend that the Government has completely failed to demonstrate wherein the District Court's findings are unsupported.

The Government states (page 15) "As partial support for its contention, the Government, inter alia, contended that neither of the taxpayers' children contributed any capital to the purported 1956 partnership." The Supreme Court in *Commissioner v. Culbertson*, 337 U.S. 733, 93 L. Ed. 1661 squarely held: "The consideration is *not* whether the *services or capital* contributed by a partner are of sufficient importance to meet some *objective* standard supposedly established by the *Tower* case, * * *." The mere fact that neither of the taxpayers' children contributed any money by way of capital to the 1956 partnership, is of no consequence and such lack of contribution did not, per se, defeat the so-called "fam-

ily partnership." The Supreme Court in *Culbertson* has plainly enunciated the factors by which the partnership is to be gauged. These factors are the agreement, the conduct of the parties in execution of its performance, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent. *The parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise.*

It is obvious from *Culbertson* that the test of a family partnership, so-called, is *subjective* rather than *objective*. However, as we have hereinbefore stated, the children did contribute to the partnership capital by transferring their 50% of the *right of use* of the lands, trees and farm equipment.

The Government (page 15 of its reply brief) makes the unsupported statement that the taxpayers were unable to show that the *services* of the children made any substantial contribution to the earnings of the partnership, and have been forced to rely upon a *fabrication* in order to attempt to show that their children contributed *capital* to the partnership. Contrary to the Government's statement, the District Court had ample evidence to support the findings that substantial services were rendered by the children to the 1956 partnership. It was the particular function of the daughter, Dolores, to keep and maintain all of the bookkeeping and accounting records (save and

except the preparation of income tax returns). The fact that these partnership duties did not occupy a majority of her working time, is beside the point and of no consequence. We are unaware of any precept of law requiring a partner to punch in to work on a time clock at nine A.M. and punch out at five P.M. The fact remains that the partnership's accounting records, necessary in the proper conduct of its business, were fully and faithfully prepared and kept by Dolores.

As to the son, Joe S. Ramos, the record is clear that after the formation of the partnership in September 1955 he worked on the ranch until the crop was harvested in November 1955. It was then that he entered military service.

The record is clear and uncontradicted that young Ramos had completed his education, he was 21 years of age, he was unmarried and he had no physical disabilities. He was immediately available for draft into the military service. Faced with this situation, and common with the problem confronting such able-bodied men of his age group, he had to make an election as to whether to continue with his partnership activities, with the present call to service imminent and hanging over his head, or to meet the military situation head-on and discharge his military obligation.

The following pertinent testimony was elicited:

“The Court: Was there any discussion at any time about holding the partnership up until he got back from the Navy?

The Witness: Oh, no. He was just a partner. If he had to go to the Navy, he had to go, but he was still a partner." (II-R. 157-158.)

Further, it is the uncontradicted record that the son was not unmindful of his partnership status and that he participated in the operation and conduct of the business as best he was able in view of the circumstances which necessitated his absence from the ranch. He was stationed at Hilo on the Island of Hawaii. He was in regular communication by letter correspondence with the members of his family, and in particular with his father and his sister. By means of letter correspondence he gave his counsel and advice and expressed his views as to definite and material matters affecting the successful operation of the partnership farming activities. Also, the uncontradicted record shows that during the occasion of his mother, sister and fiancée visiting the Island of Hawaii where he was stationed, he made known to them his concerns in connection with the partnership activities and discussed with them the various farming problems and partnership activities. Finally, it is a matter of express statute that a partner is not to suffer penalty, or to have his partnership interest jeopardized, because of absence due to military service. (Internal Revenue Code of 1954, Sec. 704(e)(2).)

Appellees have heretofore pointed out at pages 30-31 of their brief, the authorities holding for the rule that where the intent has been established to form a part-

nership, the fact of absence from the partnership as the result of military service is of no consequence.

Culbertson v. C.I.R., 168 F. 2d 979;

Seabrook v. C.I.R., 196 F. 2d 322;

Crossley v. Campbell, 87 F. Supp. 862;

Anderson v. Robinson, 115 F. Supp. 776;

Sklarsky v. U.S., 153 F. Supp. 796.

When taxpayers gave their children an interest in the "crops business" it of necessity included the *use* of the lands, trees and farming machinery. There is no gainsaying the fact that the children acquired, as partners, the sole and exclusive right, together with the mother and father, to the *use* of these items. Likewise, there is no gainsaying that this was anything other than a valuable economic right. We find nothing "strained" in this undeniable fact. The *right of use* was sole and exclusive to the members of the partnership. By conferring this *right of use* to the members of the partnership, the parents, in effect, lost their own sole and exclusive right to the use and possession of the lands, trees and farming equipment. The parents could no longer, as owners deal with any matters concerning the *use and possession* of the property as the same had become circumscribed and limited by their obligations to their children as partners. This *right of use* attached to the property until such time as the partnership would be terminated.

At page 15 the Government cites and relies on the case of *Sellers v. Commissioner*, 218 F. 2d 380. The *Sellers* case is not in point with the instant facts as

found by the District Court. In *Sellers* the Court specifically found against any intention of the Sellers family to form a partnership. *It specifically found that the partnership was not entered into in good faith.* The Court found that the son, Jack, contributed no services, and that the daughter, Virginia, did part-time jobs for the partnership, working about four months in 1944 and two months in 1945. Their written articles of partnership provided that the children would work "only such time as their other interests will reasonably permit." The opinion in *Sellers* further pointed up the fact that the tax court was entitled to *disbelieve* the testimony of the father, mother, daughter and son. In *Ramos*, the District Court has seen fit to believe and give credence to the testimony of the father, mother, daughter and son. Likewise, in *Sellers* it is pointed out that there are no "disinterested witnesses." In *Ramos* we have the testimony of the disinterested witnesses, Ruben J. Lopez, Charles H. Huff, Frank R. Molina, Sam Silvey and George W. Franzman. At the time of trial it was stated by Government's counsel: "We have had cumulative testimony as to holding out the partnership. We have had four witnesses so far tending to bear on that. We haven't given a great deal of cross-examination because we think it is fairly truthful * * *." (II. 390-A.) Therefore, the Government has admitted that the testimony of the witnesses, Lopez, Huff, Molina and Silvey is "fairly truthful."

In footnote 6 the Government expresses astonishment at the taxpayers' suggestion that the Govern-

ment did not move for a dismissal “evidently being satisfied that appellees had established their case.” The Government then refers to its brief filed with the trial court wherein at page 39 under the heading “Conclusion” it urged that judgment should be entered dismissing the complaints and these actions with prejudice. We would not characterize the concluding prayer of the Government’s brief as a motion for a dismissal. What we had, and have, in mind is that at the conclusion of the testimony before the District Court, no formal or other motion for dismissal was made by the Government.

The Government concludes its brief with references to the cases of *Kuney v. Frank*, 308 F. 2d 719 and *Sellers v. Commissioner*. We have heretofore commented on the *Sellers* case. The *Kuney* case is not an authority to be applied in the instant case. In the *Kuney* case it was held that there was no substantial evidence to sustain the verdict holding a family partnership because the parents retained control of the *income* and the donated interests. The facts in *Ramos* differ sharply. The record is clear and uncontradicted in the instant case that the income paid to the son and daughter by way of partnership profits was beyond the control of the father and the mother and under the sole and complete control and enjoyment of the daughter and the son, respectively. As far as any so-called “donated interests” are concerned, we have specifically pointed out that the parents by giving up their sole and exclusive right to the *use* of the land,

trees and equipment had thereby lost their dominion and control of these properties.

Dated, San Rafael, California,
December 6, 1967.

Respectfully submitted,
JASPER C. De DOBBELEER,
JEROME A. DUFFY,
*Attorneys for Appellees
and Cross-Appellants.*

CERTIFICATE

We certify that, in connection with the preparation of this brief, we have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

Dated, San Rafael, California,
December 6, 1967.

JASPER C. De DOBBELEER,
JEROME A. DUFFY.



Nos. 21,824 and 21,824-A
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant and Cross-Appellee,
vs.
JOE R. RAMOS and MARY RAMOS,
Appellees and Cross-Appellants.

PETITION FOR REHEARING

FILED

JUN 10 1968

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PETITION FOR REHEARING

TO: THE UNITED STATES COURT OF APPEALS FOR THE

COME now JOE R. RAMOS and MARY RAMOS, appellants, and respectfully petition the above to grant a rehearing in this matter. Petition the above entitled Court in reaching its decision. 1968, has rejected the rule set forth by the Supreme Court in the Culbertson case (Comm. v. Culbertson, 337 U.S. 401). It is petitioners' contention that the following case of Culbertson v. Comm., 168 F. 2d 979, is in this situation:

"To conclude in this case that the purpose of an aging father to enlist the int services of his four ranch-reared, experienced stalwart sons in the carrying on of his and partner's life work was not for the partner's benefit seems to require the exaltation of



1 of the times for tax collection neither deserve
2 nor demand.

3 'Neither the Constitution, the Statutes,
4 nor public policy requires that partnerships
5 between fathers and sons be outlawed or discouraged.
6 The desire of a father in any age or clime, with a
7 business that he cherishes and a son that he loves,
8 to have such son with him in his business and to
9 carry it on when he no longer can, was not rendered
10 an anathema by the Lusthaus and Tower cases, and
11 aberrations from the salutary rules announced in
12 those cases should not now do so.' "

13 The Court, at page 742 further stated the yard stick by
14 which a family partnership is to be admeasured:

15 "The question is not whether the services or
16 capital contributed by a partner are of sufficient
17 importance to meet some objective standard supposed-
18 ly established by the Tower case, but whether, con-
19 sidering all the facts--the agreement, the conduct of
20 the parties in execution of its provisions, their
21 statements, the testimony of disinterested persons,
22 the relationship of the parties, their respective
23 abilities and capital contributions, the actual
24 control of income and the purposes for which it is
25 used, and any other facts throwing light on their
26 true intent--the parties in good faith and acting
with a business purpose intended to join together
in the present conduct of the enterprise."

1 This Court makes account of the fact that transactions are
2 found to have been conducted in the year 1956 in the name of
3 Joe R. Ramos. What does the record show? Importantly, it shows
4 the Government admits a good faith intent on the part of the
5 Ramos family in the foundation of the partnerships. If good
6 faith is conceded and the uncontradicted testimony of the
7 plaintiffs and their witnesses have established that the
8 partnership was to become effective commencing January 1, 1956,
9 how may the admission of good faith be consistently reconciled

1 with a rejection of the evidence when the partnership was in
2 truth and in fact established and in active operation?
3 Similarly, if good faith on the part of the Ramos family be
4 admitted, it may not be seriously contended that the parents
5 controlled the income producing properties. The record shows
6 without contradiction that the use of the trees, lands and
7 equipment were part and parcel of the partnership assets and
8 clearly intended to be such by the partners. This is borne
9 out by the salient fact that Joe R. and Mary Ramos received
10 rent for the use of these items in the year 1957, and took
11 an added 25% of the net profits during the year 1956 in lieu
12 of rent. The critical factor to be determined is that the
13 beneficial ownership and not the technical legal title inured
14 to the members of the partnership. The record is likewise
15 replete with evidence showing that control of the said trees,
16 lands and equipment was vested solely in the partnership and not
17 retained by the parents.

18 Kuney v. Frank, 308 F. 2d 719, relied upon by this Honor-
19 able Court, is completely at variance on its facts with the
20 uncontradicted facts established in the instant case. This
21 case may not properly be considered.

22 For this Court's opinion to hold that no partnership was
23 formed or in operation for the calendar year 1957, is to com-
24 pletely thrust aside the entire evidence adduced by petition-
25 ers and which evidence is without dispute. This error is
26 further compounded by the failure of this Honorable Court to

1 take into consideration that the Government completely failed
2 to negate any of the testimony with reference to the 1957
3 partnership, as well as to the 1956 partnership. We have the
4 Government's affirmative statement that "The particular facts
5 are virtually undisputed as supported by the record evidence."
6 (II-54,217-218).

7 It is respectfully contended that this Court's decision is
8 further erroneous in that it has cast aside basic appellate
9 law that the Court of Appeals shall not properly re-try issues
10 of fact or substitute its judgment with respect to such issues
11 for that of the United States District Court, and further that
12 this Court shall not properly set aside findings of fact of the
13 District Court unless there is no substantial evidence to sus-
14 tain it, unless it is against the clear weight of the evidence,
15 or unless it was adopted by an erroneous view of the law. This
16 salutary rule of practice has been adhered to in the case of
17 General Casualty Co. of America v. School District No. 5, 233
18 F. Rep. p. 526. What this Court has attempted to do is to sub-
19 stitute the findings of fact of the trial court, which is at
20 complete variance with established law.

21 CONCLUSION

22 In view of the record developed at the trial of this case,
23 and in view of the law as enunciated by the guiding case of
24 Culbertson and the line of cases following Culbertson, and the
25 irresistible conclusion that the trial court's findings and
26 conclusions are supported by competent, relevant and material

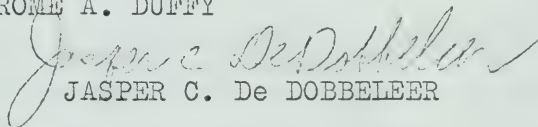
1 evidence and testimony, uncontradicted by the Government, re-
2 quires a rehearing of this cause so that substantial justice
3 may be accomplished in light of the record of this case.

4 Dated at San Rafael, California, June 7, 1968.

5 Respectfully submitted,

6 JASPER C. De DOBBELEER
7 JEROME A. DUFFY

8 By


JASPER C. De DOBBELEER

9 Attorneys for Appellees and
10 Cross-Appellants.

11 CERTIFICATE OF COUNSEL

12 I, the undersigned, one of the attorneys of record, hereby
13 certify that the points set forth in this Petition for Re-
14 hearing are meritorious and that the Petition for Rehearing
15 is being sought in good faith.

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17 JASPER C. De DOBBELEER
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ALICE HALL

No. 21,825 ✓

**United States Court of Appeals
For the Ninth Circuit**

BERNARD HIATT,

Appellant,

vs.

EMIL A. SCHLECHT, E. B. WEBER, NORMAN
L. BUCKNER, ROBERT J. CALEY, CARL M.
HALVORSON, ERIC HOFFMAN, J. M. STEIN-
MULLER, JR., and RALPH PIERSON, as
Trustees for the Oregon-Washington Car-
penters-Employers Health and Welfare
Trust Fund and as Trustees for the
Oregon-Washington Carpenters-Employ-
ers Pension Trust Fund,

Appellees.

**Appeal from the United States District Court
for the District of Oregon**

APPELLANT'S BRIEF

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No. 21,825

**United States Court of Appeals
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BERNARD HIATT,

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vs.

EMIL A. SCHLECHT, E. B. WEBER, NORMAN
L. BUCKNER, ROBERT J. CALEY, CARL M.
HALVORSON, ERIC HOFFMAN, J. M. STEIN-
MULLER, JR., and RALPH PIERSON, as
Trustees for the Oregon-Washington Car-
penters-Employers Health and Welfare
Trust Fund and as Trustees for the
Oregon-Washington Carpenters-Employ-
ers Pension Trust Fund,

Appellees.

**Appeal from the United States District Court
for the District of Oregon**

APPELLANT'S BRIEF

JURISDICTION

This is an appeal from a judgment rendered by the United States District Court for the District of Oregon. The lower Court held that it had jurisdiction because Appellant's activities "affects commerce" and that a labor dispute in his operation would tend

to burden the free flow of commerce. It has been Appellant's contention that the lower Court did not have jurisdiction over the cause, in that Appellant's activities within the industry do not "affect commerce" as that term is used in the Labor and Management Relations Act (hereinafter referred to as the "LMRA") 29 USCA 185 (a) and 142 (1).

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under Rule 73 of the Federal Rules of Civil Procedure. Notice of Appeal was filed in the time and manner required by law. (CR 130.)*

STATEMENT OF THE CASE

Appellees (hereinafter referred to as "Trustees", "Plaintiffs" or "Appellees"), as Trustees of both a pension and health and welfare trust fund, filed a complaint (CR 1) against Appellant (hereinafter referred to as "Hiatt", "Defendant", "Employer" or "Appellant"), a small building contractor seeking specific performance of certain trust agreements (Plaintiff's Exhibits 1 and 2) calling for monthly contributions by an employer to Trust Funds for the benefit of the employer's employees.

Appellant denied he entered into any such Trust Agreements with the Appellees, or into any Master Carpenters Labor Agreement (of any date) (Plaintiff's Exhibits 3 and 4), incorporating said Trust

*CR refers to Clerk's Record;

RT refers to Reporter's Transcript.

Agreements. (RT 57.) Appellant has further denied and has contended throughout that the "Trades Council Agreement" (Plaintiff's Exhibit 6), the only document signed by him, does or ever was intended to incorporate a Master Carpenters Labor Agreement, allegedly in turn incorporating the Trust Agreements under which the United States District Court found Appellees were entitled to recover.

As noted above, Appellant has further challenged the lower Court's jurisdiction in view of Appellant's activities, and the effect, if any, on interstate commerce.

STATEMENT OF FACTS

1. In 1963, Appellant, then 29 years old, high school graduate, was and had been engaged for approximately five (5) years in construction and home building. (RT 49.) He was averaging approximately \$150,000.00 per year gross actively by 1965, which included the letting out of subcontracts. In 1965 he estimated he did \$100,000.00 activity. (Hiatt Deposition, page 7.)

2. In August of 1963, Appellant testified a Union representative called on him and asked him to sign an "agreement" that would assure that all subcontractors, particularly the electricians, were union shops. Mr. Hiatt was given the distinct impression that the Union's main objective was to assure that a particular non-union electrical subcontractor would be put off the job in progress. Mr. Hiatt refused and a picket was put on the jobsite. (RT 53, 58.)

3. During the next six weeks or so, Mr. Hiatt had occasion to talk to the Union representatives twice in the vicinity of the construction project. (RT 52.) It was Appellant's unequivocal testimony that at no time was there any discussion as to any Trust Funds or Master Labor Agreements (RT 56); rather the discussion centered around the non-union electrical subcontractor and the effect of any agreement on the Hiatt's men who were non-union. (RT 58, 16.) In this regard Mr. Hiatt was advised the representatives would be responsible to convince the non-union men that it was to their advantage to join the Union. (RT 54, 59.) Mr. Hiatt stated at no time was there ever physically transmitted to him any agreements whatever until the time of his signing the Trades Council Memorandum. (RT 51, 56, 59.) Appellees' witness, Mr. J. Horstrup, confirmed this. (RT 23.)

4. Appellees' three witnesses (Union representatives) varied as to the extent (RT 33, 43) and scope of the conversation held with Mr. Hiatt (RT 23, 29, 30). One conceded that he could recall no specific reference or review whatever was made of any pension plan (RT 17); and with one exception, Appellees' witnesses reluctantly admitted there was either no review or only limited review of the Trades Council Memorandum or of any Master Carpenters Labor Agreements of any date (RT 23, 30, 41). The exception was a Mr. "Pat" Randall, who indicated detailed reference was made to the various four agreements ranging from four (4) pages (Trades Council Memorandum, Pl. Ex. 6) to 31 pages (Pension Trust Agreement, Pl. Ex. 1). (RT 30, 37.) During the

course of the trial, this Court indicated it would be hard put to accept the testimony of Mr. Randall. (RT 66.)

In the District Court's opinion (CR 126, line 29), the trial judge indicated he did "not believe that any of them accurately remember what they said." He doubted "whether the Union representatives discussed in detail the specific provisions of the Building Trades Agreement or the Carpenters Labor or Trust Agreements", but he did think they made "any false or misleading statements".

5. On October 4, 1963, Appellant, admittedly visually upset (RT 26; Horstrup deposition, page 18), went to the Union office, complained that the Union had cost him a great deal of money (RT 22), that he had to have the pickets off the job, and that he would sign whatever it was they had asked him to sign (RT 26). Appellant claims this is the first time he saw the Trades Council Memorandum (RT 51); that he didn't read it, but signed it and left; he was not there for more than ten (10) minutes (RT 56, 57, 24). The pickets were removed shortly thereafter. (RT 60.)

6. Appellant made no contribution to either Fund and Appellees filed suit July 23, 1965. (Plaintiff's Answer to Defendants' Interrogatories, No. 9.)

7. The only document signed by the Appellant is that certain document dated October 4, 1963, labeled "Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council Articles of Agreement"; this document is in turn signed by "J. Horstrup" as Secretary of "Lane-Coos-Curry-Douglas Counties

Building and Construction Trades Council". (Plaintiff's Exhibit 6, RT 57.)

8. Neither the "Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council" nor any of the trades it represented or the Appellant were signatories to any of the alleged incorporated agreements introduced into evidence, including the Health and Welfare Trust Fund, the Carpenters Employers Pension Trust Fund or the Master Carpenters Labor Agreement of either 1962 or 1965. (Exhibits 1 through 4, RT 57.)

9. There was a substantial change in April of 1965 of both the Health and Welfare Trust Fund (Pl. Ex. 1) and the Carpenters Employers Pension Trust Fund (Pl. Ex. 2), in that benefit contributions under both of these agreements were increased by the newly negotiated and executed Master Carpenters Labor Agreement, dated April 29, 1965 (Pl. Ex. 4). Neither any of the parties to this suit or the Trades Council or any of the trades it represented were a signatory to the latter agreement.

10. The Appellant did not belong to any Employer group or association authorized on his behalf to enter into any agreements, such as the Master Carpenters Labor Agreements of either date, or the Trust Funds, nor did the Appellant authorize or delegate persons to sign for him as to such agreements. (RT 57.)

11. At no time were any of Appellant's employees hired under a contract of employment, incorporating any collective bargaining agreements (Master Carpenters Labor Agreement) or any pension, or health

and welfare agreements; and, as a matter of undisputed testimony, Appellant had employees already on the job when the Trades Council Memorandum was signed and who specifically did not want to be subject to any such Union agreements or have coverage under any trust funds. (RT 52, 53.) The sole recovery sought in the lower Court was for payment to the trust fund as to carpenters or carpenter apprentices employed by Appellant. All of them were non-union employees. (RT 59.)

12. At no time did Appellant's employees receive any benefits from any of the trust funds by reason of their employment with Mr. Hiatt. (Plaintiff's Answer to Defendants' Interrogatories, No. 8.)

13. Appellant did not: (a) construct outside the State of Oregon; (b) subcontract with contractors engaged in business outside the State of Oregon; (c) purchase supplies and materials from persons outside the State of Oregon; (d) contract with subcontractors from outside the State of Oregon; (e) do any business with any firms or companies in other States; (f) work on any Federal, State or political subdivision projects; and (g) had never been involved in any defense projects. (RT 49.)

QUESTIONS PRESENTED

Each of the questions presented by this appeal was raised in the District Court.

I.

Does Sec. 301 of the Labor and Management Relations Act of 1947, as amended (29 USCA 185(a)), give the United States District Court jurisdiction when the building contractor involved does not do interstate business, or affect interstate commerce?

II.

Was there a sufficient meeting of the minds as to all terms for the lower Court to find the existence of any agreement in this instance?

III.

Are the extrinsic writings referred to in the Trades Council Memorandum, dated October 4, 1963 (Pl. Ex. 6), sufficiently connected thereto by adequate reference, or by such mutual knowledge and understanding that reference by implication is sufficiently clear?

SPECIFICATION OF ERROR

The District Court erred in its findings, conclusions and entry of judgment insofar as it determined:

1. It had jurisdiction to determine this matter under Sec. 301 of the LMRA of 1947, as amended (29 USCA 185(a)), and

2. Any valid agreement was entered into between the Trades Council and the Appellant.

SUMMARY OF ARGUMENTS**I.**

Appellant initially argues that the Federal District Court did not have jurisdiction, in that, Appellant's activities are such that he was not engaged in interstate commerce nor did his activities affect interstate commerce as this term is used in 29 USCA 185 (a) and 142 (1).

II.

Appellant's second argument centers around the undisputed fact that the parties to this lawsuit did not enter into any valid agreement or any agreement which vested in the Appellees the right to file their action in the Federal District Court.

III.

Appellant's next argument is that the Appellant and Union representatives did not enter into a valid agreement or have a sufficient meeting of the minds, which vested in the Appellees the right to maintain this action.

IV.

Finally, it is Appellant's contention that the Trades Council Memorandum (the only document signed by Appellant) is so void of reference to the agreements on which the Appellees relied for recovery—under the doctrine of incorporation by reference—that the Appellees have no standing to maintain this action.

ARGUMENTS

I.

THE FEDERAL DISTRICT COURT DOES NOT HAVE JURISDICTION OVER MATTERS NOT INVOLVING INTERSTATE COMMERCE OR WHICH DO NOT AFFECT INTERSTATE COMMERCE.

1. Applicable Federal Constitutional and Statutory Law

It is an undisputable premise that Federal District Courts have no jurisdiction other than that conferred on them by the Congress of the United States within the limits defined by the U. S. Constitution. 36A C.J.S., *Federal Courts*, Section 308, page 10, citing numerous cases. Furthermore, where allegations are made which are necessary to show jurisdiction the action will fail if these are not proven. See Rule 8(a) of the F.R.C.P., and 35A, C.J.S., *Federal Civil Procedure*, Sec. 470, page 696, citing *Jew May Lune v. Dulles*, C.A. Cal., 1955, 226 F. 2d 796. Appellees in Paragraph I of their Complaint affirmatively allege jurisdiction in the District Court by reason of 29 USCA 185 (Sec. 301 of LMRA), but as noted herein-after did not bear this burden of proof.

Under Art. I, Sec. 8, Clause 3, the Congress has the power "to regulate commerce * * * among the several states."

Under 29 USCA 185, Sec. 301 of the LMRA, it states:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdic-

tion of the parties, without respect to the amount in controversy, or without regard to the citizenship of the parties.”

It is to be noted that although the amount in controversy is immaterial, the matter must involve “an industry affecting commerce”. This term is defined in Sec. 142 (1) of Title 29 USCA (Sec. 501 of LMRA) as follows:

“The term ‘industry affecting commerce’ means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.”

2. The Evidence

In this case, no evidence was presented by Appellees affirmatively showing jurisdiction in the Court; the evidence did show that Mr. Hiatt is a small contractor in Lane County, Oregon, who over a period of approximately two (2) years prior to 1965, has had an average annual gross business activity of approximately \$150,000.00; that he made no sales outside the State of Oregon; no contracts were performed outside the State of Oregon; all supplies and materials were purchased within the State of Oregon; he does not contract with or subcontract to any companies engaged in interstate commerce, and he is not engaged in government or defense work. (RT 49.)

3. “An Industry Affecting Commerce”

Even assuming, arguendo, the existence of a valid agreement permitting Appellees to bring this action, Appellant’s activities do not affect commerce within the provisions of 29 USCA 185 (a) and 142 (1).

In *Local 384, et al. v. Maurice Patane, et al.*, 232 Fed. Supp. 740 (Ed. Pa. 1964), the Court made it clear that it was a factual issue to be first resolved as to whether or not a construction employer was engaged in activities or “an industry affecting commerce”, and it is clear from that case that jurisdiction exists only when there are facts sufficient to support the Court’s jurisdiction. In the *Patane* case, the Court found the business activities of the employer were entirely intrastate, and, accordingly, the U. S. District Court was without jurisdiction.

In the lower Court, Appellees herein cited numerous cases in support of their contention that the District Court had jurisdiction. A review of those cases reflects the following:

In *NLRB v. Denver Building and Construction Trades Council, et al.*, 341 U.S. 675 (1951), raw materials were purchased out of state in the amount of \$55,000.00, of which \$225.00 was installed in the project being picketed;

In *NLRB v. Fainblatt*, 306 U.S. 601 (1938), the employer, Fainblatt, purchased materials from out of state;

In *International Brotherhood of Electrical Workers v. NLRB*, 341 U.S. 694 (1951), the appellant had offices in New York and the construction job involved was in Connecticut;

In *Plumbers, Steamfitters, et al. v. Door County* (1961), 359 U.S. 354, one-half (1/2) of the materials were brought in from outside of the state;

In *NLRB v. Reed* (1953), 206 Fed. 2d 184, 9th CCA, there were interstate purchases by the contractor of 3% and in addition, the contractor did business for public utilities and establishments handling goods for out of state shipment; he also sub-contracted work in the amount of \$50,000.00 for interstate contractors.

Even where there has been some activity affecting interstate commerce, the Federal Courts have not always assumed jurisdiction. The above definition is substantially parallel to Sec. 2 (7) of the NLRA, Sec. 152 (7) of Title 29 USC which reads:

“The term ‘affecting commerce’ means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.”

To guide itself in interpreting the phrase “affecting commerce” as it is defined in Sec. 2 (7) NLRA the National Labor Relations Board adopted “jurisdictional yardsticks”. Those which went into effect on August 1, 1959, provide in the case of non-retail businesses that jurisdiction will be asserted if the yearly outflow or inflow, direct or indirect, is \$50,000.00 or if the business has a “substantial impact” on national defense. (NLRB Release R-506, CCH Labor Law Reporter, Labor Relations Sec. 1610.)

In *Groneman, et al. v. International Brotherhood of Electrical Workers, Local Union No. 354*, 177 F. 2d 995 (1949), the principle of *de minimis* was applied. The District Court dismissed for lack of jurisdiction an action brought by an employer to recover damages

resulting from stoppage of construction work allegedly due to a secondary boycott. The U.S. Court of Appeals for the 10th Circuit affirmed on the ground that the plaintiff's operations were entirely intrastate except for \$6,000.00 worth of goods purchased for the job under dispute. The Court found that "the impact of this labor dispute upon commerce . . . is so trifling and microscopic" as to require the application of the *de minimis* doctrine. (177 F. 2d 995 at 997-8.) The same principle was applied in *Newell v. Chauffeurs, Teamsters & Helpers Local Union 795*, 317 P. 2d 817, 181 Kan. 898 (1957). In that case, purchases by a local dairy of about \$100.00 per month from other states and purchases from local sources of capital assets which had been manufactured in other states were held to have a negligible effect on interstate commerce. The Court found that such purchases fell under the maxim *de minimis*.

In this case Mr. Hiatt subcontracted his plumbing to other contractors for \$800.00 per house, including labor and materials (RT 64); he built houses in the \$10,000.00 to \$15,000.00 range (RT 50) and averaged \$100,000.00 to \$150,000.00 a year or 7 to 10 houses annually, indicating plumbing purchases (even indirectly) were very nominal, and within the *de minimis* rule.

4. The District Court's Determination

In his deciding opinion, the able trial judge acknowledged that Appellant "purchased all of his supplies and performed all of his contracts in Oregon and did not do any work either as a contractor or sub-

contractor for any company engaged in interstate commerce". (CR 123.) The Court then stated:

"Defendant admitted that from October, 1963, to October, 1965, he purchased \$300,000.00 worth of supplies for use in his construction business and although he may have purchased all of his supplies locally, the plumbing and electrical fixtures and supplies were manufactured outside of Oregon." (CR 123.)

At the conclusion of Appellees' (Plaintiffs') case in chief, the Appellant (Defendant) took the stand in his defense; after direct examination and cross-examination (RT 49, 62) Appellees' attorney requested that he be allowed to ask another question. (RT 63.) At this one point the following colloquy took place:

"By Mr. Bailey:

Q. Mr. Hiatt, did you, during the previous year of 1965 or the present time, purchase from any source inside the State of Oregon, products that originated outside of the State of Oregon?

A. I imagine, I don't know what. I imagine some of the hardware did come from outside the State of Oregon.

Q. Do you know any source, for example, for hot water heaters——

A. I don't know.

The Court: The plumbing comes from outside of the state?

The Witness: I imagine most of it.

The Court: Wash basins, toilets of all kinds, they are manufactured in Wisconsin and various other states.

The Witness: I imagine so.

Q. (By Mr. Bailey): You have purchased those?

A. I buy from a local—the local plumbing contractor here.

Q. Which does originate outside the state?

The Court: I know that.

Mr. Bailey: That was the question I was interested in.

The Witness: I pay on a subcontract for labor material and plumbing.

The Court: That is all.

Mr. Camarot: May I just ask a question?

The Court: Yes.

Q. (By Mr. Camarot): Approximately how much prior to 1963, did you have in the way of plumbing subcontract bid?

A. I was building about three houses a year.

Q. How much was your subcontract bid?

A. Seven hundred or \$800 per house.

Q. Does that include labor?

A. Labor and fixtures.

Q. How much approximately would the labor be?

A. I don't know.

Mr. Camarot: No further questions.

Mr. Bailey: No further questions.

The Court: That's all. (Witness excused.)"

This is the only evidence known to Appellant that has any close proximity to the trial Court's assertion, quoted above; this is the only evidence supporting Appellees' affirmative proof of jurisdiction.

At the outset and even assuming the fact that "the plumbing and electrical fixtures and supplies were manufactured outside of Oregon" (a fact that may

well be disputed) the manufacture of these items may be considerably removed from Appellant's purchase thereof. The manufacturer could well have sold them to an Oregon distributor who, in turn, sold them to an Oregon wholesaler, who, in turn sold them to an Oregon supplier, who, in turn, sold them to a local plumbing contractor, who, in turn, made the sale to Appellant's subcontractor. The cases noted above all appear to be concerned with a more immediate and direct affect on commerce.

The Court should not take judicial notice of where a particular item is geographically manufactured unless it is a matter of general public knowledge or concern, which is known by all well-informed persons. 31 C.J.S., *Evidence*, Sections 6 and 9, pages 822 and 824, citing a host of authorities. It has been held that whether gasoline is produced in a state in commercial quantities is not within the common knowledge of well-informed persons. C.f. *Spur Distributing Co. v. Lindsey*, 62 SW 2d 53 (Tenn.), appeal dismissed, 54 Supreme Court 81, 290 U.S. 588, 78 L. Ed. 519. Although in *Wallace, Inc. v. Pfof*, 65 P. 2d 725 (Idaho, 1937), 110 ALR 613, the Court took judicial notice automobiles are not manufactured within the State of Idaho, the nature of the product and its economic effect, if such had been manufactured within the state, explains the ruling, and it is readily understandable why this would be a fact of common knowledge.

It is submitted that the lower Court took notice of an alleged fact of which it appears he may have

had some personal opinion, but, as stated above, judicial knowledge is generally limited to what a judge knows in his judicial capacity or concerns a fact generally or notoriously known. See *Laurance v. Laurance* (1953) 198 Or. 630, 258 P. 2d 784, 787, quoting 31 C.J.S., *Evidence*, Sec. 11, page 832.

II.

THE APPELLEES AND THE APPELLANT HAVE NOT ENTERED INTO ANY VALID AGREEMENT WHICH IMPOSES ANY CONTRACTUAL LIABILITY ON THE APPELLANT IN FAVOR OF APPELLEES.

There is at least one clear-cut case wherein the Court refused to find a contractual liability under a welfare plan where the trustees or representatives of the welfare plan were not signatories to an alleged agreement between an employer and a union.

In *Seafarers' Welfare Plan v. George E. Light Boat Storage, Inc.*, CCH 53 Labor Cases, Paragraph 11,364, the Texas Court of Civil Appeals refused to set aside a trial Court's finding that there was no binding agreement between the employer and the representatives of a welfare plan so as to require contributions to be paid by the employer.

"It should be noted here that appellant failed to obtain the testimony of Drozak either in person or by deposition, and failed to introduce any evidence that there was any oral or written agreement between the three parties which was entered into by them all. It merely introduced in evidence a one-page incomplete agreement which was not executed by Seafarers' Welfare Plan. Drozak,

who signed the agreement for the Union as its alleged agent, was not present at the trial, and, as stated, did not testify. There is nothing to show that there was any oral agreement between the parties prior to the incomplete written form of agreement. There is no evidence that appellant consented to the terms of the written agreement which it did not execute, nor that there was any meeting of the minds of the three parties involved or any promise or obligation mutually binding on all three of them to do anything. Appellant complains that the court's finding is not supported by any evidence and also that such finding is against the great weight and preponderance of the evidence. It is our view that there is evidence which supports the court's finding."

There is a like void of evidence in this case.

The appellant in the *Seafarers'* case also attempted to allude to the existence of a bargaining agreement to support its position. The Court refuted this contention by stating:

"The evidence shows that George E. Light did not sign any collective bargaining agreement. The only collective bargaining agreement in the record is that between the Union and appellee, which was executed by Drozak for the Union and by Joe B. Light for appellee. Appellee asserts, however, that Joe B. Light had no authority from the board of directors of the company to execute the collective bargaining agreement. It is our view that it is not necessary for this Court to determine whether or not there was a valid collective bargaining agreement entered into by the Union and appellee. Appellant was not a party to the col-

lective bargaining agreement and as stated there was no collective bargaining between appellant and appellee."

Mr. Hiatt comes within the category of a non-member employer in that he is not an employer represented by other employers or a signatory Association. The evidence is unequivocal in this regard. Section 2 of Article IX of the Trust Agreement and Pension Plan (Pl. Ex. 1) and Section 2 of Article IX of the Health and Welfare Trust Fund (Pl. Ex. 2) both have the following language:

"Section 2. Any Individual Employer who is not a member of or represented by Employers or a Signatory Association, but who is performing work of the type coming under the terms of the Collective Bargaining Agreement and within the jurisdiction of Union, may become a party to this Trust Agreement by executing in writing and depositing with the Board of Trustees his or its acceptance of the terms of this Trust Agreement in a form acceptable to the Board."

There is absolutely no evidence that Mr. Hiatt at any time sought to become a party to either trust agreement "by * * * acceptance of the terms of (either) trust agreement in the form applicable to the Board". (The word "either" has been substituted for the word "this" in the actual language of the Section.) This, by the Appellees' own prerequisites which it is submitted is a condition precedent, there has not been a valid offer or acceptance required by the Trust Agreement which would bind the parties to this action to any agreement.

III.

THERE WAS AN INSUFFICIENT MEETING OF THE MINDS AS TO ALL THE TERMS FOR THE LOWER COURT TO FIND THE EXISTENCE OF AN AGREEMENT IN THIS INSTANCE.

IV.

EXTRINSIC WRITINGS IDENTIFIED IN ANY AGREEMENT MUST BE SUFFICIENTLY CONNECTED THERETO BY SPECIFIC REFERENCES, OR BY SUCH MUTUAL KNOWLEDGE AND UNDERSTANDING THAT REFERENCE BY IMPLICATION IS CLEAR.

1. Introduction

Arguments II, III and IV overlap. As to Argument II, the contentions therein will also bear in the Arguments herein. In addition, Appellant will argue there was an insufficient meeting of the minds (Argument III) because, among other things, the extrinsic writings which Appellees claim were incorporated by reference into the alleged agreement were not so incorporated as a matter of both fact and law. (Argument IV.)

Conversely, the clear lack of any understanding as to what, if any, extrinsic writings were to be included in the Trades Council Memorandum (Argument IV) is evident from both the testimony and the Memorandum itself, and its obvious ambiguity lends clear support to the failure of the parties to have a meeting of the minds. (Argument III.)

2. Re: III. Insufficient Meeting of the Minds

It is Appellant's position, in part confirmed by Appellees' witnesses, that no reference or discussions

were held with regard to the trust funds; that the two discussions held prior to October 4, 1963, from the job-site concerned (1) eliminating a non-union electrical subcontractor from the jobsite, and (2) the effect, if any, the contemplated agreement would have on the Appellant's non-union employees. There was no denial that the Appellant was paying wages equal to the Union's requirement. (RT 29.)

The circumstances surrounding the actual execution of the Trades Council Agreement are important and under Oregon law can be considered by the Court (Oregon Revised Statutes 42.220), particularly when a written agreement is ambiguous on its face. (See Oregon Revised Statutes 42.260, and *Klimek v. Perisich*, 231 Or. 71, 371 P. 2d 956 (1962).)

As the District Court noted in the Opinion, he did not believe that either of the parties to the Trades Council Memorandum "accurately remembered what they said" on the two occasions they met, and the Court doubted "whether the Union representatives discussed in detail the specific provisions of the Building Trades Agreement or the Carpenters Labor or Trust Agreement * * *". (CR 126, 127.) Thus, the District Court recognized that there was little discussion of the multi-page documents which the parties are purported to have agreed to.

But of far greater importance is the alleged scope of the purported agreement. To permit recovery, the lower Court had to find that the Trades Council Memorandum (Pl. Ex. 6) incorporated the existing (1962) and future (1965) Master Labor Agreements

(Pl. Exs. 3 and 4) and the Health and Welfare and Pension Trust Fund Agreement (Pl. Exs. 1 and 2).

A cursory examination of the Trades Council Memorandum makes it obvious that the form adopted came from another source. Paragraphs contained therein are completely unrelated. Compare the reference in paragraphs 6 to 8, the latter paragraph having no bearing to paragraph 6.

The relative knowledge and familiarity of the general subject matter as existed between the signatories should be considered. If anything, the representatives of the Union were supposedly far better versed in the subject at hand, and yet it is obvious that there were inconsistencies among them. (RT 24, 25.) In contrast Mr. Hiatt testified that not only had there been no discussion regarding Master Labor Agreements and Trust Funds, but he never had the occasion to see the Trades Council Memorandum until he signed it, and didn't know about its contents. (RT 51.) Obviously, he was assuming the contents included only those subject matters that had been discussed.

The Court's attention is also called to the Trust Fund Agreements, which, among other things, require that:

“5. There must be a detailed written agreement with the employer specifying the manner of payment.”

The Trades Council Memorandum can hardly qualify as a “detailed written agreement.”

The appropriate law in this case is found in *Klimek v. Perisich*, supra. The Oregon Supreme Court, citing

numerous cases and authorities reaffirmed the following principles of contract law:

“It is well settled that when a contract is to be found on an offer and acceptance, it must be shown that the latter coincides with the former, and unless this appears there is no agreement.”
(p. 78 id.)

In other words, there must be a meeting of the minds as to the obligation each assumes under the contract before it can be said that a contract exists. The record makes it obvious that there was no meeting of the minds in this instance.

In *Reed, et al. v. Montgomery*, 180 Or. 196, 220, 175 P. 2d 986, 1006 (1947), the Supreme Court stated:

“Before there can be a valid contract the parties must have a distinct intention, common to both and without doubt or difference, so that there is a meeting of the minds as to all terms, and if any portion of the proposed terms is not settled or no mode is agreed on by which it may be settled, there is no agreement.”

In support of this holding, the Court cited the following authorities:

- (1) *Williston on Contracts*, Rev. Ed. Sec. 45;
- (2) 12 Am.Jur. *Contracts*, Secs. 23 and 24, p. 519;
- (3) 17 C.J.S. *Contracts*, Secs. 31 and 49, pp. 359, 394;
- (4) Restatement of the Law, *Contracts*, Sec. 32;
- (5) Numerous cited Oregon cases.

Oregon holds to the rule that every contract must be definite and certain as to the terms to be per-

formed by either party, and where the Court cannot fix the exact legal liability of the parties, the contract is unenforceable. See *Gaines v. Vandecar*, 59 Or. 187, 115 P. 721; rehearing denied 59 Or. 187, 115 P. 1122 (1911); *Bonnevier et ux. v. Dairy Cooperative Association*, 227 Or. 123, 361 P. 2d 262; *Landgraver et ux. v. DeShazer et ux.*, 239 Or. 466, 398 P. 2d 193.

It is submitted that there was no meeting of the minds of the two signatories to the Trades Council Memorandum.

3. Re: IV. Extrinsic Writings Must Be Connected to an Agreement by Clear Reference or by Mutual Knowledge

It has been the Appellant's consistent argument that the incorporation by reference upon which the Appellees must rely to prevail is insufficient in this instance to bring about a valid contract between the parties, at least insofar as it incorporates the collective bargaining agreements and the trust agreements.

In *NLRB v. Local No. 2 of United Association of J and A of P and PI*, 360 Fed. 2d 428, 436 (2nd CCA May, 1966), the Court stated that agreements not explicitly incorporated into a collective bargaining agreement are not a part of that agreement. In that case, they found a provision in a union contract had, by the action of one of the parties, in fact, been incorporated into the agreement.

An interesting case in the field of labor contracts is *Weiner v. Mercury Artists Corporation*, 130 NYS 2d 570 (NY 1954), wherein the agreement between the

owners of a small resort and an employment agency (which had agreed to supply an orchestra and a leader) contained the following language on a one-page standard form type contract:

“The rules, laws and regulations of the American Federation of Musicians, and the rules, laws and regulations of the Local in whose jurisdiction the musicians perform * * * *are made part of this contract*, and to such extent nothing in this contract shall ever be construed as to interfere with *any obligation which any employee hereunder may owe to the American Federation of Musicians pursuant thereto.*” (Italics added.)

The agency (defendant) sought to stay all proceedings brought by the owners (plaintiffs) contending that an arbitration was required under the rules of the Federation. The Court noted that the sole issue was “whether plaintiffs made a binding and definitive contract to arbitrate any controversy that might arise.” In refusing to incorporate the printed booklet of the Federation as part of the contract, the Court made the following observations, which are equally germane to the case at hand:

“The rules thus allegedly incorporated by reference into the simple one page contract between the parties consists of a 207 page printed booklet in which somewhere between pages 62 and 66 of this bulky document, there is a wordy and at least as to the parties involved, a somewhat vague provision for arbitration to be determined, however, by the *International Executive Board of the Federation.*”

“Plaintiffs are not in the music business, and, of course, they never saw nor were ever made aware of the existence or the nature of the rules of the Federation or informed that they contained any arbitration provisions. Under the circumstances disclosed, we hold that the provision of the contract relating to incorporation of the printed booklet was not sufficiently clear to bind plaintiffs to a definitive contract to arbitrate * * *”.

This Court's attention is called to the many pages in the Master Carpenter Labor Agreements (Pl. Exs. 3 and 4) and the Trust Fund Agreements (Pl. Exs. 1 and 2).

In *New York Racing Association v. Independent Association of Mutual Employees*, 224 NYS 2d 784 (NY 1962), a memorandum agreement was also entered into between the parties wherein the employer agrees to “continue the pension plan in the form presently in existence * * *” and there was an incorporation by reference of the entire pension plan. Notwithstanding the Court concluded that even

“Under these circumstances it cannot be said that it was the clear intention of the parties to arbitrate grievances arising under the pension plan. Inasmuch as the pension plan is not incorporated into the collective bargaining agreement, the grievance concerning the administration of its pension plan is not incorporated into the collective bargaining agreement. The grievance concerning administration of its pension plan alleged by the Independent Association does not fall within the ambit of paragraph 18 of the collective

bargaining agreement, which provides that arbitration is to be had concerning 'all grievances hereunder'."

And see *Hill v. Mercury Record Corporation*, 168 NE 2d 461 (Illinois 1960).

At the time of trial, Appellant cited to the Court the case of *Calhoun v. Bernard*, 333 Fed. 2d 739 (9th CCA 1964), 359 Fed. 2d 400 (9th CCA 1966) as support for his position. In the Trial Court's Opinion, the Court employs the *Calhoun* case in support of his conclusion. In the *Calhoun* case there was a Memorandum Agreement entered into between the parties wherein the employer claimed he was not bound by a subsequent agreement modifying the earlier collective bargaining contract. In that particular case, the Appellate Court sustained the Trial Court's finding that the employer had committed himself to the collective bargaining agreement, particularly those subsequently entered into. It is interesting to note the similarity of the language in the Memorandum Agreement with that of the agreement now before this Court, excepting the language which incorporates the printed related documents. In the *Calhoun* case the pertinent paragraph of the Memorandum Agreement read as follows:

"* * * That the undersigned employer agrees to comply with the wages, hours, and working conditions as set forth in that certain agreement referred to for convenience as the labor agreement between Southern California General Contractors and United Brotherhood of Carpenters

and Joiners of America, dated May 1, 1954 (copy of which has been delivered to me and receipt of which is hereby expressly acknowledged) and any modifications or changes herein.”

The argument in the *Calhoun* case primarily concerned itself with whether or not the word “herein” should have been “therein” and further whether the employer understood that he was bound to make payments to the pension trust by reason of future labor agreements. In the *Calhoun* case, the Trial Court found that the employer had, in fact, been given a copy of the 1954 Master Collective Bargaining Agreement and 1957 Amendments thereto when he signed the memorandum agreement in 1959 and that these collective bargaining agreements had incorporated the pension fund and contribution requirements. It is significant to note that the Trial Court in the *Calhoun* case went beyond the relatively clear written language of the memorandum signed by the employer therein to determine if he was bound by the bargaining agreement.

A pertinent case explaining the rule of contract law set forth herein is *Newton v. Smith Motors, Inc.*, 122 Vt. 409, 175 A 2d 514 (1961),

“It is of course well established that a contract may be reached with reference to another writing, and the other document, or so much of it as is referred to, will be interpreted as a part of the main instrument. But the extrinsic writing must be connected by specific reference or by such mutual knowledge and understanding on the

part of both parties that reference by implication is clear. If the secondary instrument was not mentioned in the undertaking and was foreign to the minds of the parties at the time of their undertaking, it is clearly irrelevant as an aid to interpretation. (Nye v. Lovitt, 92 Va. 710, 715, 24 S.E. 345; Highland Inv. Co. v. Kirk Co., 96 Ind. App. 5, 184 N.E. 308, 309; Lee v. Rovert Mitchell Mfg. Co., 45 Ohio App. 502, 187 N.E. 371, 372; Williston, Contracts, Sec. 628 (Rev.Ed. 1936) p. 1801 et seq.; 12 Am.Jur., Contracts 246, p. 781.)”

In the case now before the Court, it is Appellant's position that as a matter of law (1) the references in the Trades Council Memorandum are insufficient (compare the language in the latter agreement with the memorandum in the *Calhoun* case) and (2) the most favored testimony produced by Appellees was that only a cursory and general discussion was had with respect to any of the agreements allegedly entered into; no review of any trust funds, or the provisions thereof was ever undertaken by either the signatories to the agreement or anyone else, and there was no physical transfer of the Trust Agreements or the Master Labor Agreements of 1965 to Mr. Hiatt. It is submitted these latter instruments were foreign to the negotiations and the minds of the parties at any time during their negotiations or the signing of the Trades Council Memorandum.

CONCLUSION

For the reasons set forth herein, it is again urged upon this Court to find that jurisdiction does not exist in this case, or that, alternatively and if the Court finds that jurisdiction does exist, there can be no recovery because the Trades Council Memorandum is not a valid binding contract, nor did it properly integrate extraneous documents and incorporate them into the said Memorandum.

Dated, Springfield, Oregon,
June 22, 1967.

Respectfully submitted,
SANDERS, LIVELY, CAMAROT & WISWALL,
By HENRY J. CAMAROT,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HENRY J. CAMAROT,
Attorney for Appellant.

United States
COURT OF APPEALS
for the Ninth Circuit

BERNARD HIATT,

Appellant,

v.

EMIL A. SCHLECHT, E. B. WEBER, NORMAN
L. BUCKNER, ROBERT J. CALEY, CARL M.
HALVORSON, ERIC HOFFMAN, J. M. STEIN-
MULLER, JR. and RALPH PIERSON, as
Trustees for the Oregon-Washington Carpen-
ters-Employers Health and Welfare Trust Fund
and as Trustees for the Oregon-Washington
Carpenters-Employers Pension Trust Fund,

Appellees.

APPELLEES' BRIEF

*Appeal from the United States District Court
for the District of Oregon*

FILED

BAILEY, SWINK and HAAS

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AUG 17 1967

WM. B. LUCK, CLERK

AUG 25 1967



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Appellees.

APPELLEES' BRIEF

*Appeal from the United States District Court
for the District of Oregon*

JURISDICTION

Appellee agrees with and accepts Appellant's state-
ment of jurisdiction.

STATEMENT OF THE CASE

Appellees agree with and accept Appellant's state-
statement of the case.

STATEMENT OF FACTS

Appellees cannot agree with or accept Appellant's statement of facts. The trial court in its opinion and order succinctly set forth facts (p. 1, l. 30 thru p. 5, l. 16)¹ which are hereby adopted by Appellee, (C.R. 122-26).²

QUESTIONS PRESENTED

I

Does the United States District Court have jurisdiction of this suit under Sec. 301(a) of the Labor-Management Relations Act as amended (29 U.S.C. 185(a)), because it involves and has an affect on interstate commerce?

II

Is there a valid and enforceable agreement obligating Appellant to comply with the provisions of the Oregon-Washington Carpenters-Employers Pension Trust Fund and Health & Welfare Fund.

SUMMARY OF ARGUMENTS

I

Because it pertains to a matter involving and having an affect on commerce under Sec. 301(a)

¹ The Pension Trust Fund Agreement referred to at p. 3, lines 12-13 is found as Plf's. Ex. 1. The Health and Welfare Trust Fund Agreement referred to at p. 3, line 13 is found as Plf's. Ex. 2. The Carpenters Labor Agreement referred to at p. 3, line 10 is found as Plf's. Ex. 3. The Building Trades Agreement referred to at p. 3, line 23 is found as Plf's. Ex. 6.

² (C.R. refers to Clerk's Record)

(R.T. refers to Reporter's Transcript)

of the Labor-Management Relations Act as amended (29 U.S.C. 185(a)) the United States District Court had jurisdiction of this case.

II

The Appellant is contractually bound by and obligated to comply with the terms and provisions of the Oregon-Washington Carpenters-Employers Pension Trust Fund and Health and Welfare Trust Fund.

A. Federal substantive law is paramount and governs the rights and duties of parties in suits arising under Sec. 301(a) of the Labor-Management Relations Act as amended (29 U.S.C. 185(a)).

B. The Pension Trust Fund and Health and Welfare Trust Fund Agreements were sufficiently connected to and incorporated in the Building Trades Agreement executed by Appellant to bind him to the terms thereof.

C. The fact the trustees of the Pension and Health and Welfare Trust Funds are not signatories to the Building Trades Agreement does not render Appellant's obligation to the fund unenforceable or void.

D. There was sufficient meeting of the minds between the parties here involved to find a valid and enforceable contract.

ARGUMENT I

The Federal District Court Has Jurisdiction Over This Matter Because It Involves and Has an Affect on Interstate Commerce

(1) Applicable statutory provisions

Congress, in Sec. 301(a) of the Labor-Management Relations Act as amended (29 U.S.C. 185(a)), has granted jurisdiction to the Federal District Courts over "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, . . . without respect to the amount in controversy . . ." The term "industry affecting commerce" is defined by Sec. 501 of the Labor-Management Relations Act as amended, (29 U.S.C. 142(1)), as ". . . any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce. . . ."

(2) The situation of the present case

The appellant purchased approximately \$300,000 of materials and supplies between 1963 and 1965 for use in his construction business (C.R. 123). These were used in the construction of from seven to ten buildings annually with a price range of \$10,000 to \$15,000 each (Appellant's Brief, p. 14). The plumbing work for these buildings was accomplished by subcontractors under bids approximating \$800 per house for labor and fixtures (R.T. 64). The plumbing

fixtures were manufactured outside of Oregon (C.R. 123). These figures indicate an annual total for these items of from \$5,600 to \$8,000 annually. In addition, electrical fixtures for these projects were procured from outside Oregon (C.R. 123).

(3) Appellant's construction business activity constitutes an "Industry Affecting Commerce."

The overriding standard in determining that an industry affects commerce is whether or not the particular labor dispute or activity complained of bears some substantial relation to the conduct of trade and commerce among the states or tends to burden and obstruct commerce and the free flow of commerce. But this does not mean that the parties involved must necessarily be directly engaged in interstate commerce. A party whose operation is wholly intrastate can still be found to indirectly affect interstate commerce. *Plumbers & Steamfitters, Local 298 v. Door County*, 359 U.S. 354 (1959); *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951); *NLRB v. Fainblatt*, 306 U.S. 601 (1939).

The Denver Bldg. Trades case is particularly applicable to the facts of the instant matter. In that case a subcontractor purchased goods manufactured out of state and used them in completion of the project in question which had been subjected to union picketing. The Court found that the picketing activity might result in decreases in the importation of goods from outside the state and therefore an industry affecting commerce was involved. Also analogous is the

case of *Plumbers & Steamfitters Union, Local 598 v. Dillon*, 255 F.2d 820 (9th Cir. 1958) where a contractor had rented a small shop in Washington State and contracted to lay 700 feet of pipeline into the Columbia River. The fabrication of the pipeline was accomplished in Washington State but the pipe itself was manufactured outside the State. This was held sufficient for the Court to find that refusal by the appropriate union to furnish workers for the project was an activity directed at an industry affecting commerce.

Likewise, in the instant matter, the dispute involving the terms and application of the Building Trades Agreement might, as found by the trial court (C.R. 124), well influence the influx of plumbing and electrical fixtures into the State of Oregon.

Within the above standard it is firmly established that the size of a particular business, *Plumbers and Steamfitters Union, Local No. 598 v. Dillon*, 255 F.2d 820 (9th Cir. 1958), or the actual dollar value of commerce it conducts interstate, *NLRB v. Fainblatt*, 306 U.S. 601 (1939), is not alone determinative of whether the business affects commerce. Congress, under the statutes here involved and set out supra p. 4, has clearly and plainly set no restrictions upon Federal jurisdiction by reference to dollar amounts, *United Brotherhood of Carpenters and Joiners of America v. Sperry*, 170 F.2d 863 (10th Cir. 1945). The dollar value may certainly affect the amount of commerce involved to a greater or lesser extent, but if commerce is nevertheless involved, there is no con-

gressional restriction on control over the business, *NLRB v. Fainblatt*, 306 U.S. 601 (1939).

This analysis is, of course, subject to the so-called de minimis rule as to matters affecting commerce, *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951). But under currently adopted court standards this objection to the exercise of federal jurisdiction clearly does not apply in the instant case.

As set out *supra* p. 5, appellant's building activity involved the annual use of goods moving in interstate commerce valued at \$5,600 to \$8,000. This certainly is a substantial volume of interstate business, particularly in light of the fact appellant has carried on his business for at least five years prior to the two years in question in this case (R.T. 49).

The appellant has placed marked emphasis on several cases construing the de minimis doctrine. In *Local 384, Teamsters v. Patane*, 232 F. Supp. 740 (E.D. Pa. 1964) the business involved, unlike that of the present case, purchased none of its material or equipment in interstate commerce and sold all of its products locally. The court simply concluded that the de minimis rule was not even applicable because of a complete lack of interstate commerce affect. Secondly, the case of *Groneman v. IBEW, Local 354*, 177 F.2d 995 (10th Cir. 1949), involved the picketing of a construction job where approximately \$6,000 of materials were purchased outside the state. The court applied the de minimis rule and refused jurisdiction of a damage suit resulting from the picketing. There

is, however, a clear distinction in that the *Groneman* case represents activity by a union aimed at a single construction project and single \$6,000 purchase, while the instant case involves dispute over a collective bargaining agreement intended to run for several years (see Building Trades Agreement, Art. IX, Plt's. Ex. 6) and affecting the receipt and systematic purchase of goods manufactured outside Oregon in amounts upwards of \$8,000 annually and approaching \$16,000 during the two years here in question. Furthermore, Appellant's total purchases of supplies and materials approached \$150,000 annually from 1963 to 1965 (C.R. 123) while in *Groneman*, the construction job involved total purchases of only \$14,000. Finally, a local dairy purchasing goods from other states totaling about \$100 per month or \$1200 per year was held to fall within the de minimus rule in *Newell v. Chauffeurs, Teamsters & Helpers, Local 795*, 181 Kan. 898, 317 P.2d 817 (1957). This amount is, however, substantially below that expended by the Appellant's subcontractors for the plumbing and electrical work involved.

Beyond this principal theory of affecting interstate commerce it is also a well established principle that although a particular activity or labor dispute in isolation is essentially local and intrastate, if when multiplied into a general and broad practice it could reasonably exert an adverse effect on interstate commerce clearly calling for regulation and control then the local incident or industry may be regulated by federal action, *United Brotherhood of Carpenters and*

Joiners of America v. Sperry, 170 F.2d 863 (10th Cir. 1948). If the contract dispute here involving the Oregon - Washington Carpenters - Employers Health and Welfare and Pension Trust Funds were extended to all the construction operations in Washington and Oregon operating under that agreement (see Carpenters Labor Agreement, p. 68, Plt's. Ex. 3) the affect on the influx of goods from outside and between the states would greatly increase the already substantial impact resulting from the instant case.

The "jurisdictional yardstick" of \$50,000 for non-retail businesses adopted by the NLRB is pointed out at page 13 of Appellant's Brief as bearing on the jurisdiction of the federal district courts in cases coming under Sec. 301(a) of the Labor-Management Relations Act of 1947, as amended, (29 U.S.C. 185(a)). However, such yardsticks are not determinative of the jurisdiction of the district courts. Only the NLRB, and not the district courts, have this discretionary power to decline jurisdiction where it seems advisable, *Local 384, Teamsters v. Patane*, 232 F. Supp. 740 (E.D. Pa. 1964). To the contrary, Congress has made it clear and the courts have emphasized, as set out supra p. 6, that the dollar volume of commerce conducted does not alone determine what constitutes an "industry affecting commerce" under the Labor-Management Relations Act.

Appellant's Brief beginning at page 14 asserts that the trial judge took little more than judicial notice of the fact that the plumbing and electrical fixtures for Appellants building projects were manufac-

tured outside of Oregon. However, the record of this case reflects that this was not the fact. As set out by the trial judge, a joint hearing was conducted concerning this case and four others involving employee benefit trust funds to determine the issue of jurisdiction (C.R. 123). At that time written briefs were filed and oral arguments heard from all the interested parties. It was held that the federal district court did in fact have jurisdiction. The subsequent raising of that issue by Appellant in this case and the trial court's decision in favor of jurisdiction were simply a reiteration of that issue, involving much more than mere judicial notice of facts.

(4) The pension and health and welfare trust funds represent employees affecting the flow of interstate commerce.

Although stated as dictum in the case, this court, in *Plumbers & Steamfitters Union, Local 598 v. Dillion*, 255 F.2d 820 (9th Cir. 1950), took a third direction and strongly intimated that regardless of an employer's direct or indirect involvement with interstate commerce, where a labor union involved sends workers across state lines and deals with employees in more than one state, the standard for an "industry affecting commerce" is met. In the present case, the Carpenters Labor Agreement covers Oregon-Washington Carpenters-Employers Health and Welfare and Pension Trust Funds represent Carpenters Union employees and non-union carpenters throughout all of Oregon and most of five Washington Counties. (see

Carpenters Labor Agreement, p. 68, Plt's. Ex. 3), therefore coming within the dictum of the *Dillion* case.

ARGUMENT II

The Validity and Enforceability of the Oregon-Washington Carpenters-Employers Health and Welfare and Pension Trust Fund Agreements.

(1) The appropriate law to be used.

The appropriate substantive law to be applied in suits brought under Sec. 301(a) of the Labor-Management Relations Act as amended (29 U.S.C. 185 (a)), is federal law fashioned by the federal courts to carry out the policies of national labor laws, *Local 175, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962); *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). Where that law conflicts or is inconsistent with established federal law, the authority of the federal law is paramount and prevails over the inconsistent state law, *Local 174 Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962); *Local 24, Teamsters v. Oliver*, 385 U.S. 283 (1959).

(2) The pension trust fund and health and welfare trust fund agreements are sufficiently connected to and incorporated in the building trades agreement executed by appellants to bind him to the terms thereof.

Appellant signed the Building Trades Agreement (Plt's. Ex. 6) on October 4, 1963, which contained

the following provisions:

“II

Except as herein provided the Employer, developer and/or Owner-Builder agrees to abide by all of the terms and conditions of the agreements of the respective craft employed, including wages, hours, working conditions, health and welfare benefits, pension benefit and other fringe benefits and hereby adopts such Trust or Fund agreement of each operative Union for such fringe benefits and agrees to the appointment of Employer, developer and/or Owner-Builder Trustees or their successors.”

There is ample evidence that prior to signing the Building Trades Agreement Appellant was repeatedly made aware of the Carpenters Labor Agreement and the Oregon-Washington Carpenters-Employers Health and Welfare and Pension Trust Funds (R.T. 19, 30, 37, 42).

The trial judge found from the evidence that Appellant knew he would have to do more than simply hire union subcontractors to meet his obligations under the Building Trades Agreement (C.R. 126), and that the only possible pension and health and welfare funds that Article II of the Agreement could refer to were those brought to the awareness of the Appellant (C.R. 127).

The reference to the Health and Welfare and Pension Trust in the Building Trades Agreement coupled with the knowledge of Appellant and his awareness as to his obligations thereunder are sufficient

under the holding of *Calhoun v. Bernard*, 359 F.2d 400 (9th Cir. 1966) to incorporate the trust fund agreements into the Building Trades Agreement, binding the Appellant. As quite correctly pointed out by the trial judge's opinion (C.R. 127), there is no requirement under the *Calhoun* ruling that a document incorporated into a collective bargaining agreement be referred to specifically by name.

In *Calhoun*, reference was simply made to a pension plan to be negotiated between the parties and, as in the instant case, the employer was informed that he would be bound by a master labor agreement including the making of contributions to a pension plan.

The case of *Lewis v. Quality Coal Corp.*, 270 F.2d 140 (7th Cir. 1959) involving a separate but analogous situation lends further support to the present case. The collective bargaining agreement executed by Quality Coal required that all workers employed be union members to the extent and in the manner permitted by law. The court found this very general language sufficient to incorporate the provisions of Sec. 8(a)(3) of the National Labor Relations Act as amended (29 U.S.C. 158(a)(3)) in the contract in order to avoid an allegation of illegality in the contract as creating a closed shop agreement.

In any event, and regardless of the sufficiency of incorporation here involved, where an employer, as a party to a collective bargaining agreement, is not initially bound by its trust fund provisions due to

some defect in negotiations or its provisions, he is still obligated to immediately renounce or repudiate any liability to that trust fund despite the fact he has made no payments thereto at least by such time as it is sought to be enforced against him, and failure to do so will imply consent to its terms, *Lewis v. Lowry*, 322 F.2d 543 (4th Cir. 1963). The evidence in the instant case reflects that a Mr. Pio, as trust coordinator for the Oregon-Washington Carpenters-Employers Health and Welfare and Pension Trust Funds, introduced himself to Appellant on April 22, 1964, relating to him his position and the reason for his visit. In response to Mr. Pio's inquiries, regarding contributions to the trust fund Appellant merely stated that he had no employees at the time. In no way did he even imply or intimate that he was not bound by the health and welfare and pension fund arrangement as he now asserts (R.T. 46-47, 60-61 and Hiatt deposition p. 32).

(3) The fact the health and welfare and pension trust funds trustees are not signatories to the building trades agreement does not render appellant's obligation to the fund unenforceable or void.

Where a pension or Health and Welfare Plan is incorporated or included within the terms of a collective bargaining agreement, the trust or trustees managing the plan need not actually sign the collective bargaining agreement. They are third party beneficiaries of the agreement and as such can enforce the terms of the plan, *Lewis v. Benedict Coal Corp.*,

361 U.S. 459 (1960); *Calhoun v. Bernard*, 333 F.2d 739 (9th Cir. 1964).

These federal court rulings are contrary to the holding of *Seafarers' Welfare Plan v. George E. Light Boat Storage Inc.*, CCH 53 Labor Cases 11, 364, 402 S.W.2d 231 (Texas Court of Civil Appeals, 1966) relied on by appellant (Appellant's Br. 18), where the Texas Business Corporation Act was applied to find a welfare trust plan unenforceable for failure of the trustees to have executed a writing also signed by the employer. Because of the predominance of federal law in this area, set out supra p. 11, the federal court decisions must prevail over this inconsistent local law.

Section 2 of Article IV of the Trust Agreement and Pension Plan (Pl. Ex. I) and Section 2 of Article IX of the Health and Welfare Trust Fund (Pl. Ex. 2) state that, "Any individual employer . . . who is performing work of the type coming under the terms of the Collective Bargaining Agreement and within the jurisdiction of Union, may become a party to this Trust Agreement by executing in writing and depositing with the Board of Trustees his or its acceptance of the terms of this Trust Agreement in a form acceptable to the Board."

Appellant contends he has done nothing to become a party to either of the Trust Agreements in a form acceptable to the Board of Trustees (see Appellant's Br. 20). On the contrary, it is quite clear Appellant has become obligated to the terms of the

Trust Agreement on a basis acceptable to its trustees. The Building Trades Agreement is an agreement employed specifically by unions and the trustees to bind employers to the terms of the respective local union contracts and the trust agreement according to the testimony of Jens Horstrup, executive secretary of the Lane-Coss-Curry-Douglas Counties Building Trades Council, (see Horstrup Dep. p. 15) and the findings of fact by the trial judge (C.R. 124-25). Appellant's contentions therefore, seem wholly without merit as to this point.

(4) There was sufficient meeting of the minds of the parties to find a valid contract and contractual obligation.

Several witnesses testified during the trial of this case that Appellant was, on various occasions, furnished copies of the Carpenters Labor Agreement making reference to the terms of the Trust Agreements and that they discussed with Appellant at several times the health, welfare, pension and other fringe benefits he would be obligated to provide (R.T. 17, 30, 37, 42). Appellant further testified that he was aware generally that health, welfare, pension and other fringe benefits are involved in collective bargaining agreements (Hiatt deposition p. 47). From this evidence the trial judge concluded that there was a meeting of the minds as to the contractual obligation of the Appellant to make payments to the trust funds (C.R. 126-127).

A trial court's findings of fact are presumed correct. Unless the record on appeal establishes that the

trial judge's decision was clearly erroneous and had no basis in fact, the findings of the trial court should stand, *Calhoun v. Bernard*, 33 F.2d 739 (9th Cir. 1964). The record in the instant case is replete with testimony and evidence supporting the trial judge's findings as to whether Appellant and Appellees reached a meeting of their minds regarding Appellant's contractual obligation. Those findings clearly should not be disturbed.

CONCLUSIONS

For the foregoing reasons, Appellees respectfully submit that the decision of the United States District Court should be affirmed.

Respectfully submitted,

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By PAUL T. BAILEY
Attorneys for Appellees

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PAUL T. BAILEY
Attorney for Appellees

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARCHITECTURAL MODELS, INC.,)
a California corporation,)
)
Appellant,)
)
v.)
)
NILS C. NEKLASON and)
DONALD NUSBAUM doing business)
as SCALE MODELS UNLIMITED,)
)
Appellees.)

APPELLANT'S OPENING BRIEF

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NO. 21,826

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARCHITECTURAL MODELS, INC.,)
a California corporation,)
)
Appellant,)
)
v.)
)
NILS C. NEKLASON and)
DONALD NUSBAUM doing business)
as SCALE MODELS UNLIMITED,)
)
Appellees.)
)

APPELLANT'S OPENING BRIEF

This is an appeal from the final judgment of the District Court for the Northern District of California holding that Appellees (Defendants) had not infringed Letters Patent owned by Appellant (Plaintiff).

The case below involved a cause of action by Plaintiff for patent infringement (CT. 1)* with defenses of patent invalidity and non-infringement (CT. 7). The same issues were raised by a counterclaim (CT. 11) for declaratory judgment of patent invalidity and non-infringement. The District Court rendered judgment (CT. 52) for Defendants on these two causes by holding that the Defendants did not infringe the patent.

Though the validity issues were tried, the District Court refrained from determining the validity of the patent on the ground that the judgment of non-infringement disposed of the entire controversy between the parties concerning the patent (CT. 39).

Both parties below alleged causes of action for unfair competition (CT. 3 & 14), but these causes of action were dismissed (CT. 53), and neither party has appealed as to these causes.

This appeal, therefore, relates only to that part of the judgment which determined that Defendants had not infringed the patent.

*References to the Clerk's Transcript are designated CT. followed by page number. References to the Reporter's Transcript are designated RT. followed by page number. Exhibits are referred to by EX. followed by the Exhibit number.



JURISDICTION

Jurisdiction over the patent infringement action in the District Court was based on 28 USC §1338(a) (CT. 1) and was admitted (CT. 7). Jurisdiction over the declaratory judgment counterclaim was based on 28 USC §§2201 & 2202 (CT. 11) and was admitted to the extent of the four patent claims placed in issue by the Complaint (CT. 18).

Jurisdiction of this Court is based on 28 USC §1291. The judgment of the District Court was entered March 10, 1967 (CT. 52). Appellant filed its notice of appeal on April 5, 1967 (CT. 54) within the thirty day period provided by 28 USC §2107.

STATEMENT OF THE CASE

Plaintiff, Architectural Models, Inc., is a California corporation (CT. 40), owned primarily by two women, Virginia Green and Leila Johnston. The corporation succeeded in 1960 to a partnership of the same name which the two women had formed in 1955 after receiving their masters degrees in fine arts, (RT. 32 & 449). The partnership, the corporation,

and the two women are sometimes referred to herein collectively as Plaintiffs.

The Defendants are ex-employees of the Plaintiffs. Defendant Neklason was employed by Plaintiffs from May of 1958 until September 28, 1962 (CT. 44). Defendant Nusbaum was employed by Plaintiffs from November 1, 1961 (CT. 44) until September 28, 1962, when the Defendants terminated their employment to start their own business (EX. XX & YY).

During the early part of 1960, the Plaintiffs invented a machine for making topographical models, and the patent which they obtained on that machine is the subject matter of this suit (EX. M). During the period of his employment by Plaintiffs, Defendant Neklason was the principal user of that machine (RT. 217).

THE INVENTION

The models which Plaintiffs have made throughout the period of their business are small scale models which are used by architects and developers to illustrate proposed buildings (EX. V). For artistic reasons, the models are

generally provided with small scale models of trees, people, automobiles, and the like, made on the same scale as the building model, and all of these models are mounted on a scale model of the land on which the building is to be built (EX. V). The land model is called a topographical model because it is shaped in three dimensions with hills and valleys in accordance with the topography of the land (RT. 34). Prior to 1960, Plaintiffs had been making their topographical models by several tedious methods (RT. 35-37).

In the spring of 1960, Plaintiffs decided to try to cut their topographical models directly out of solid blocks of plastic foam (EX. WW & RT. 239-244). They knew at that time that plastic foam models had been made and that machines were available for cutting such models (CT. 27). The machines that were available, however, were very complex. Plaintiffs considered using a pantograph, but they rejected that idea because they believed that the long linkage arms in a pantograph would be too cumbersome in the large size machine they needed (RT. 239-240).

June 16, 1964

V. GREEN ET AL

3,137,209

APPARATUS FOR MAKING TOPOGRAPHICAL MODELS

Filed July 27, 1961

2 Sheets-Sheet 2

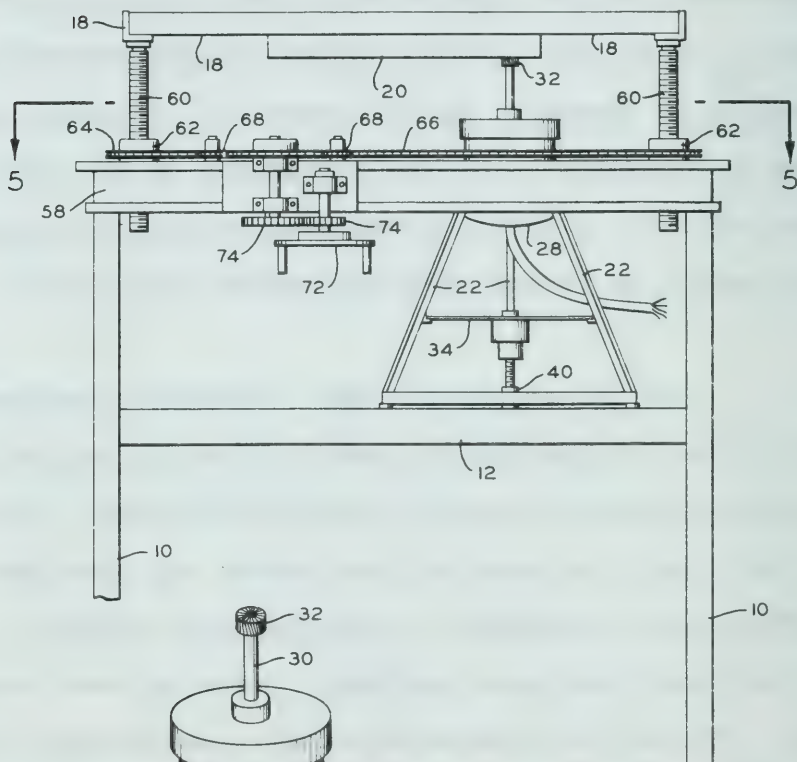


FIG. 3.

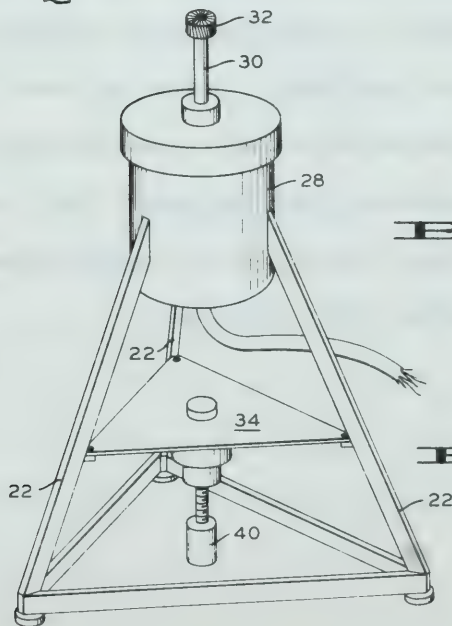


FIG. 4.

INVENTORS
VIRGINIA GREEN
LEILA M. JOHNSTON
BY

Naylor & Neal

ATTORNEYS

The first machine that Plaintiffs devised is shown in Figs. 3 and 4 of the patent in suit which are reproduced on the facing page (EX. HH & M). This machine includes a frame with four legs numbered 10 which support a flat table 12. An overhead frame 18 is mounted above the table 12, and a block of plastic 20 is suspended from the frame 18.

A router assembly, shown in Fig. 4, slides freely in any direction on the table 12 underneath the plastic 20. The router assembly has a cutting tool 32, driven by an electric motor 28, and a stylus 40.

This machine is used to cut a topographical model upside down. The plastic 20 from which the model is to be cut is mounted overhead on the frame 18, and a map of the land is mounted on the table 12 underneath the router assembly. With the machine arranged in this way, the cutting tool 32 will cut into the plastic 20 above at a location which is determined by the position of the stylus 40 near the map on the table (EX. M).

Now, the map which is mounted on the table is a topographical map which contains contour lines representing

paths of equal elevation on the land. If a man were to walk on the land along a path represented by a contour line on the map, he would walk along a level path, neither going up-hill nor down-hill (RT. 34). When the machine is used to cut a model, an operator moves the router assembly of Fig. 4 around the table 12 while following a contour line on the map with the stylus 40. As the stylus 40 follows the contour line, the cutter 32 directly above the stylus cuts a flat shelf in the plastic 20 which has the same shape as the contour line (RT. 44-49).

Every topographical map has a large number of contour lines representing paths of different elevation on the land. An adjustment is made on the machine before each new contour line on the map is followed with the stylus 40 so that the cutting tool 32 cuts into the plastic 20 to a different depth for each contour line. These depth-of-cut adjustments are made in the machine of Figs. 3 and 4 by jack screws numbered 60, a chain and sprocket mechanism 66 - 62, and a hand wheel 72 (RT. 44-49).

The machine is used progressively in this way, following one contour line with the stylus 40, then changing



the depth of cut of the cutter 32, then following another contour line, etc. until the cutter has formed large hills in the plastic 20 from a large number of small steps. One of Plaintiffs' machines is illustrated on the facing page with a model partially completed.

THE REVERSE PRINT PROBLEM

Referring again to Fig. 3 of the patent, it will be noted that the model 20 being made and the map on the table 12 are facing toward each other like a man and his image in a mirror. After a model has been made upside down on the machine, it is taken down and turned rightside up. The rightside up model will be a mirror image of the map which the operator saw while operating the machine. By analogy, if we could take the man's image out of the mirror and turn it around and put it beside the man, the man's right eye would be the image's left eye. The problem of mirror images is one we see every time a color slide is placed in a projector backwards.

The mirror image problem is inherent in Plaintiffs' machine because the work piece 20 and the table 12 face

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toward each other. The solution to the problem is simple, however, since a proper model will be cut if the map which the operator sees on the table is a mirror image of a topographical map.

The problem and solution were explained in the patent in suit, Exhibit M, Column 1, Lines 63-66, "Since the work is formed on the machine in an upside down position while the map is supported rightside up, a reverse print of a conventional topographical map should be used." A reverse print is a mirror image of a conventional right reading print (RT. 94) as illustrated on the facing page. Where the paper on which a topographical map is made is transparent, as where the map is drawn on tracing paper, the mirror image, i.e. reverse print, of the map can be seen by looking at the map from the back of the paper (RT. 95-96). In some situations where Plaintiffs' machines have been used, a special reverse print has not been made, and instead, the topographical map has been mounted on the table 12 face down so that the operator sees the map like a reverse print (RT. 95-96).

PLAINTIFFS' IMPROVED MACHINE

As indicated above, a vertical adjustment must be made in the machine to change the depth of cut of the tool 32 when the operator moves from one contour line to the next. In Plaintiffs' first machine shown in Figs. 3 & 4 of the patent, this adjustment was made by raising and lowering the entire upper frame 18 and model 20 with the four jack screws 60.

After Plaintiffs tried out their first machine, they conceived of a better way to make the vertical adjustment and that was by moving the cutting tool 32 up instead of moving the frame 18 down (RT. 54-60). This permits the accurate vertical adjustment to be built into the small compact router assembly instead of the main frame of the machine (EX. M, Col. 3, Ll. 12-19).

One form of this improved machine is shown in Figs. 1 & 2 of the patent which are reproduced on the next facing page. That machine, like the first machine has a frame 10, map table 12, and overhead frame 18. No accurate vertical adjusting means is provided for adjusting the

June 16, 1964

V. GREEN ETAL

3,137,209

APPARATUS FOR MAKING TOPOGRAPHICAL MODELS

Filed July 27, 1961

2 Sheets-Sheet 1

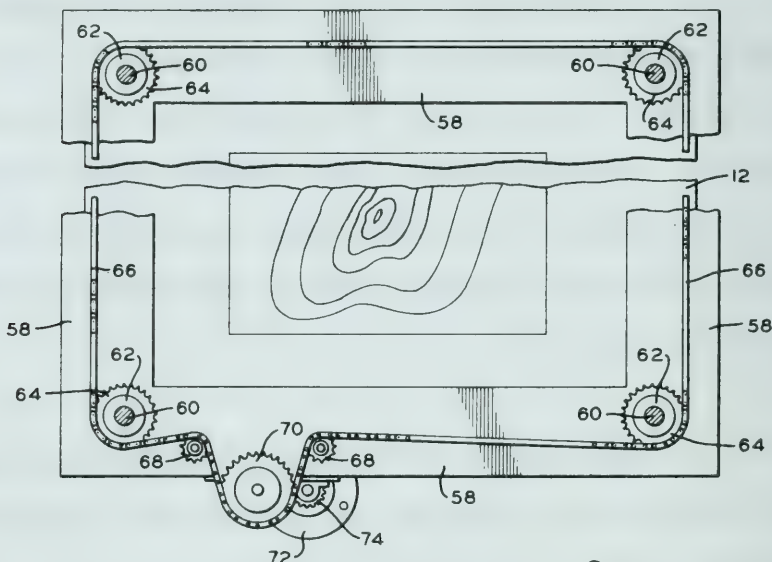


FIG. 5.

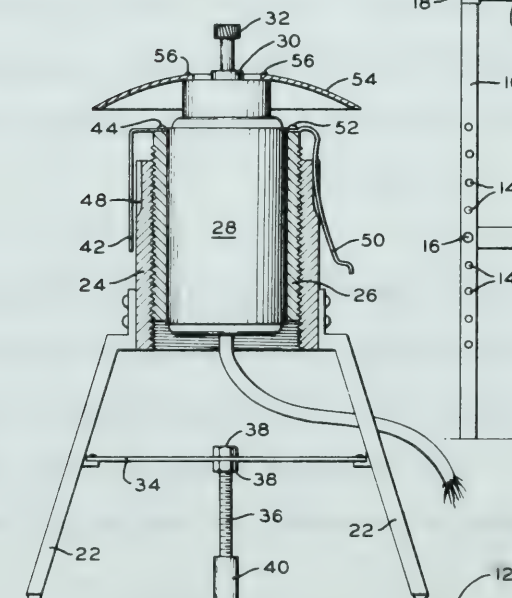


FIG. 2.

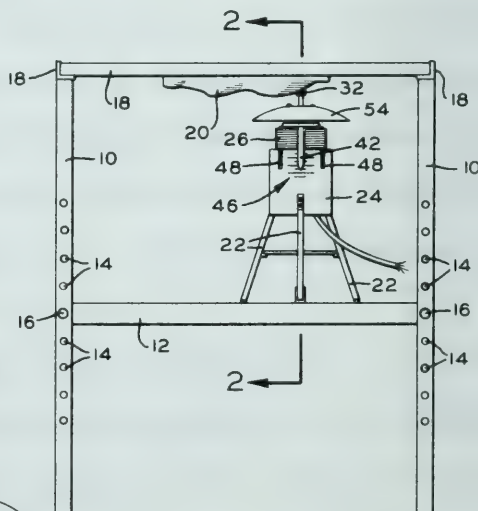


FIG. 1.

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Naylor & Neal

ATTORNEYS

height of the frame 18. Instead, the cutting tool 32 may be moved up and down in the router assembly by screwing externally threaded sleeve 26, which fixedly carries the router motor 28, up and down inside a threaded sleeve 24 of the router assembly (EX. M). The machine shown in Figs. 1 & 2 has never been built by Plaintiffs (CT. 43).

While the patent shows in Figs. 1 & 2, one form of vertical adjustment in the router assembly, that is, a screw threaded arrangement, Plaintiffs have conceived of other structures for the same purpose. Before the patent application was filed they considered using a rack and pawl for the vertical adjustment in the router assembly (EX. O, RT. 56-60). After the patent application was filed, and before the present controversy arose, they considered using and did use a rack and pinion as a vertical adjustment in the router assembly of their second machine (EX. 28, PP. 18-21). The second machine is the machine shown in the photograph facing page 8 (EX. II). That machine contains a vertical adjustment of jack screws in the main frame, similar to the first machine, but it also includes the rack and pinion adjustment in the router assembly (EX. 28, PP. 18-21).



PLAINTIFF'S PATENT

As indicated above, the patent in suit (EX. M) discloses two forms of model making machine, the machine of Figs. 3 & 4 having an accurate vertical adjustment in the main frame of the machine, and the machine of Figs. 1 & 2 having an accurate vertical adjustment in the router assembly.

The patent contains three groups of claims, namely (A) claims directed toward the type of machine shown in Figs. 1 & 2 of the patent, (B) claims directed toward the type of machine shown in Figs. 3-5 of the patent, and (C) claims which are generic to both types of machines. Plaintiff has charged the Defendants with infringement of only four claims in the patent, namely Claims 4, 5, 11 and 14, and all four of these claims relate specifically to the type of machine which has the accurate vertical adjustment in the router assembly (see Findings 33 and 34 at CT. 48 & 49). The details of these claims are mentioned in greater detail below.

Dec. 21, 1965

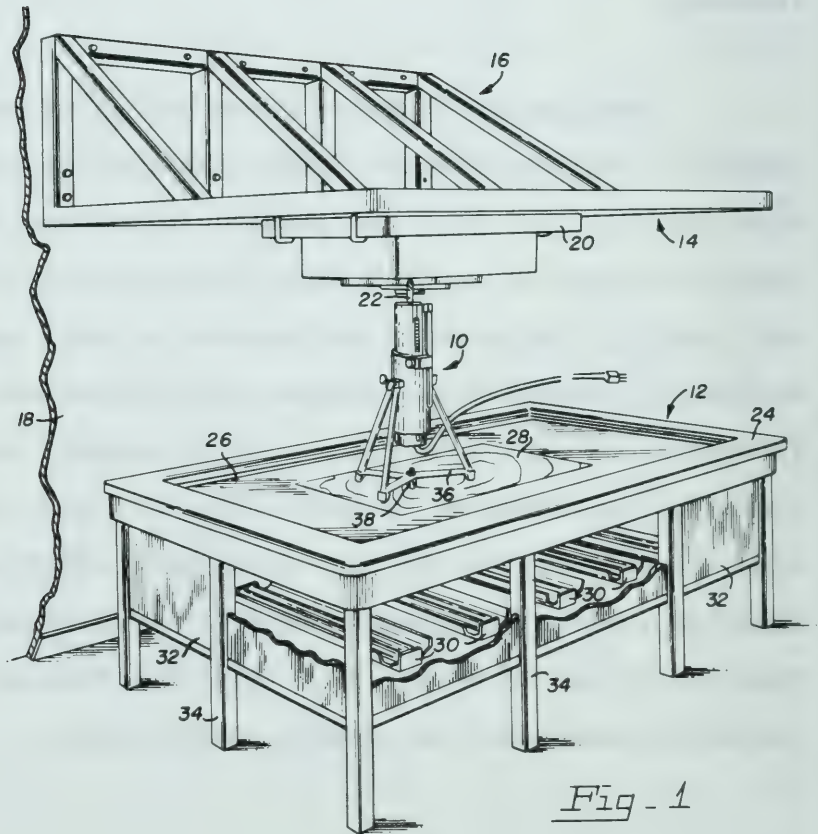
D. W. NUSBAUM ET AL

3,224,339

METHOD AND APPARATUS FOR CUTTING TOPOGRAPHIC MODELS

Filed Dec. 16, 1963

2 Sheets-Sheet 1



INVENTOR

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NILS C. NEKLASON

BY

Harvey S. Lowburt

THE DEFENDANTS' MACHINE

The Defendants' machine which is alleged to infringe Plaintiff's patent is shown in the Defendants' patent (EX. 8, Fig. 1 of which is identical to EX. Q).

The Defendants' machine is illustrated on the facing page and that machine includes, a table 12 with an overhead frame 14 supported above the table by mounting the frame 14 on the wall of the building 18. A block of plastic foam 20 is suspended upside down from the overhead frame 14, and a topographical map 28 is mounted on the table 12 directly below the plastic 20.

A router assembly 10 rides on the table 12 and carries a stylus 38 which is used to follow lines on the topographical map and a cutter 22 driven by an electric motor for cutting into the plastic 20 at a location which is determined by the location of the stylus 38 near the map below. The router assembly 10 includes a rack and pinion mechanism (illustrated in greater detail in other figures of the patent) which may be manipulated to change the

depth by which the cutting tool 22 cuts into the plastic 20 (CT. 24 & 25).

The Defendants' machine operates in substantially the same way as Plaintiff's machine (RT. 85-96). Defendants claim that their machine does not use a reverse print of a topographical map because their table 12 is a "light table" in which the table top 26 is transparent and is illuminated from below by lights 30. The Defendants say that their map 28 is a right reading print of a map mounted face-down instead of a mirror image print mounted face-up. The map 28 on the Defendants' machine must be mounted in such a way that the operator sees it as a reverse print because the map table 12 and the work holding frame 14 are facing in opposite directions, just as in Plaintiff's machine to create inherently the mirror image problem. The Defendants mount a right reading print face down so that it will look to the machine operator like a reverse print because the machine operator must see the map as a reverse print to cut a proper model (RT. 654).

Before the Defendants used the machine shown in their patent, they used an earlier form of machine which was

identical as far as the construction of the router assembly and the overhead frame 14 are concerned. The earlier machine differed from the machine in the Defendants' patent in that the earlier machine had a standard opaque table in place of the light table 12 (CT. 25). When the Defendants used the earlier machine with the opaque table instead of the light table, they used a reverse print of the topographical map on the opaque table in the same way that Plaintiff uses a reverse print (RT. 647 & 648).

The Defendants claim that they avoid infringement of Plaintiff's patent because the rack and pinion mechanism employed in their router assembly is not the equivalent of the screw threaded mechanism shown in Figs. 1 & 2 of Plaintiff's patent. The Defendants claimed at one time that they had invented the entire concept of providing vertical motion in the router assembly instead of the main frame of the machine (EX. N). Defendant Neklason was asked about his state of mind at the time he "invented" the use of the rack and pinion, and he testified as follows:

"Q. Did you feel that the rack and pinion adjustment was new because of the fact that it was a rack and pinion or because of the

fact that it provided the vertical adjustment of the machine in the router assembly?

"A. We felt it was new because it provided the vertical adjustment in the machine. The rack and pinion idea itself is an old idea.

"Q. And you felt that provision of the vertical adjustment in the router assembly was your idea?

"A. Yes, sir." (RT. 626 & 627)

The Defendants thus admitted that the rack and pinion itself is old and the important feature of the Defendants use of a rack and pinion is the fact that the rack and pinion provides a vertical adjustment in the router assembly which is the same feature disclosed in Figs. 1 & 2 of Plaintiff's patent.

THE CLAIMS IN SUIT

As indicated above, Plaintiff has sued on only Claims 4, 5, 11 and 14 of its patent. All four of these claims relate to the type of machine in which the vertical accurate adjustment is provided in the router assembly instead of the main frame of the machine. Claims 4 and 5 re-

late to the overall machine including the map table, overhead frame, and router assembly whereas Claims 11 and 14 relate to the router assembly itself.

The texts of the four claims in suit are reproduced in Appendix I with the claims broken down into sub-paragraphs with each of the separate structural elements of the machine defined by the claim set forth in a separate paragraph. A fold-out sheet is attached to this Brief as Appendix II presenting in side-by-side relation the drawings illustrating the Plaintiff's and the Defendants' machines with text material indicating the numbers on the drawings designating the parts recited in the claims.

THE FILE HISTORY

The District Court's opinion was based in part (Finding No. 10, CT. 41) upon a supposed implied agreement between Plaintiffs and the Patent Office concerning the scope of the claims in Plaintiffs' patent. Thus, the District Court found in Finding No. 10 that a holding that the Defendants' machine infringed the patent claims would "give these claims a broader scope than represented to and understood by the Patent Office. . ."

The file history of Plaintiffs' patent (EX. 2) constitutes the correspondence between the Patent Office and Plaintiffs' attorneys which preceded the issuance of Plaintiffs' patent. The file history indicates that the application for the patent (EX. 2, P. 1) was filed on July 27, 1961. On August 30, 1962, the Patent Office issued a letter (EX. 2, P. 19) in which the Examiner rejected the broad claims in the application and required restriction of the application to one of the two machines shown in the patent. Plaintiffs filed a response to this rejection (EX. 2, P. 21), and the Patent Office then issued a second rejection (EX. 2, P. 25) on July 10, 1963 again rejecting all of the claims in the application.

As indicated below, Plaintiffs learned shortly after this rejection that the Defendants were using their machine, and about the end of August, 1963, one of the attorneys for Plaintiff personally interviewed the Patent Office Examiner handling the application in an attempt to convince the Examiner to allow the application. No agreement on the allowability of the application was reached at that interview (EX. 2, P. 29), and on about September 9, 1963, Plaintiff filed a formal response to the second re-

jection (EX. 2, P. 28). In this second response, Plaintiffs amended the claims in the application to recite that the topographical map which the table of the machine was "adapted to support" was a "reverse print".

Following this amendment the Examiner issued a third and final rejection (EX. 2, P. 40) rejecting all of the claims in the application.

After this final rejection, Plaintiff did not amend the claims further in any way, but instead proceeded to appeal from the Examiner's decision to the Board of Appeals of the United States Patent Office. At that time, Plaintiff was aware of the Defendants' activities as indicated below, and for this reason, Plaintiff attempted to take advantage of a "special" procedure in the Patent Office. An appeal to the Patent Office Board of Appeals is normally quite time consuming, but in certain circumstances, the Patent Office will treat patent applications as being "special" and take up those applications for examination out of turn so that the normal Patent Office delays are avoided. One of the grounds on which the Patent Office will make an application special is the ground of "infringement", that is where some third

party is using the invention which the applicant is attempting to patent and the applicant files a petition for special prosecution to permit the applicant's patent to issue without delay.

Following the Examiner's final rejection, Plaintiffs filed a petition to make special (EX. 2, P. 43) and the affidavits which normally are required to support such a petition. These affidavits included an affidavit of Leila M. Johnston (EX. 2, P. 45) with an attached sketch describing the Defendants' machine to the Patent Office and an affidavit of Plaintiff's patent attorney (EX. 2, P. 48) stating that in his opinion, some of the claims in the application were unquestionably infringed by the Defendants' device.

On the basis of these representations to the Patent Office that the present Defendants were infringing claims in the application, the petition to make special was granted by the Patent Office Board of Appeals (EX. 2, P. 73). The claims in the application were not changed after the petition to make special was filed telling the Patent Office that the claims were infringed by the Defendants' machine.

At the time the petition to make special was filed, Plaintiff also filed an appeal from the Examiner's final rejection to the Patent Office Board of Appeals (EX. 2, P. 51) together with Appellant's Brief on Appeal (EX. 2, P. 52). The next action by the Patent Office on the merits of the application after filing of applicant's Brief was the Patent Office Notice of Allowance (EX. 2, P. 76) by which the Patent Examiner formally allowed the application.

The District Court in Finding No. 10 quoted a passage from Plaintiff's Brief on Appeal to the Patent Office Board of Appeals. This passage is the paragraph which starts at the bottom of page 62 of EX. 2 and is one paragraph out of the sixteen page Brief on Appeal. In order to understand the argument which Plaintiff's attorney was making in that paragraph, it is necessary to examine the Shaver patent (EX. 3B) upon which the Patent Examiner was relying in rejecting Plaintiff's application.

The Shaver patent employed a table 14 for supporting a topographical map (right reading print) with a stylus 48 on top of the table which was used to follow the lines on the map. The Examiner had rejected Plaintiff's patent application (EX.

P. 40) on the ground that it would be obvious (hence unpatentable) to modify the Shaver device by placing the stylus 48 underneath the map and table 14 instead of on top of the map and table as Shaver had constructed his machine. The paragraph quoted by the District Court from Appellant's Brief was an argument made in response to this rejection of the Patent Examiner. Plaintiff's attorney was arguing that the modification of the Shaver machine by mounting the stylus underneath the table would not work because it would be impossible to see the stylus and map at the same time when they were on opposite sides of the table. The attorneys argument that the Shaver machine would have to be modified even further after it was modified as proposed by the Examiner provides no evidence that Plaintiff relinquished patent protection on machines with a transparent table; the argument merely indicates that Plaintiff contended that some unobvious (hence patentable) modification of the Shaver device needed to be made in order to convert the Shaver device into the Plaintiff's machine. The identical argument would have been appropriate whether or not the claims made mention of "reverse print".

SPECIFICATION OF ERRORS

Plaintiff relies on the following specification of errors in this appeal:

1. The trial court erred in concluding that Claims 4, 5, 11 and 14 of the patent are not infringed by Defendants.

2. The trial court erred in concluding that Claims 4 and 5 require the use of a reverse print which is not required or used in Defendants' device.

3. The trial court erred in holding that the Defendants do not use a reverse print in their machine.

4. The trial court erred in finding that to give the patent claims a broader scope than the court gave those claims would be to give those claims a broader scope than represented to and understood by the Patent Office. In this regard, Plaintiff contends that Finding of Fact No. 10 is inconsistent with Finding No. 9 and is clearly erroneous. Plaintiff did not represent to the Patent Office that the Defendants' machine or any similar machine was outside the scope of the patent claims. To the contrary, it was expressly represented to the Patent Office by way of affidavits that the machine of these Defendants "unquestionably infringed" the claims.

5. The trial court erred in finding that the rack and pinion construction of Defendants' machine is not the equivalent of the screw-in type construction of Fig. 2 and Claim 11 of the patent. In this regard, Plaintiff contends that purported Finding of Fact No. 13 is not only clearly erroneous but that it is not a Finding of Fact, being instead a Conclusion of Law. The screw-in type construction and the rack and pinion construction are both old and well known devices which have been used interchangeably for centuries and are the full equivalents of each other.

6. The trial court erred in finding that Claim 14 of the patent is no broader in scope than Claim 11 and that Defendants do not employ the structure of Claim 14.

7. The trial court erred in looking to Claim 11 for the meaning of Claim 14.

8. The trial court erred in holding that Plaintiff's patent is no more than a paper patent since Plaintiff's first machine illustrated in Exhibit HH is similar to the machine shown in Figs. 3-5 of the patent and has been made and used commercially, and Plaintiff's second machine illustrated in EX. II and containing the rack and pinion described at EX. 28, PP. 18-21 is similar to the machine shown in Fig. 2 and has been made and used commercially.

ARGUMENT

Summary

The District Court's decision (CT. 31) shows that the infringement issues break down into two basic problems, the reverse print problem and the equivalency problem. Claims 4 and 5 were held not infringed because of the reverse print problem, and Claims 11 and 14 were held not infringed because of the equivalency problem. On the first pair of claims, the District Court held that (1) a reverse print is an essential part of Claims 4 and 5, and (2) the Defendants do not employ a reverse print. Plaintiff submits that both of these holdings are clearly erroneous.

On the second pair of claims, the District Court held that (1) the rack and pinion structure of the Defendants' machine was not the equivalent of the screw-in construction of Claim 11, and (2) that the broader Claim 14 was limited to the scope of Claim 11. Plaintiff submits that the first of these holdings is clearly erroneous, and that the second of these holdings is a conclusion which is erroneous as a matter of law.



The Reverse Print Is Not Part Of The Patented Machine, But Merely Relates To The Manner In Which The Machine Is Used.

One of the structural elements of the invention as defined in Claim 4 is "a generally horizontal table thereon (on the frame) adapted to support a reverse print of a topographical map representing the model which is to be made." By this express language, the table is part of the apparatus which Plaintiffs patented, and the topographical map or a reverse print of the map is not a part of the invention. Instead, the reverse print of a topographical map relates to the manner in which the patented machine is operated; that is, when the machine is operated, the operator places a reverse print of a topographical map on the table of the machine because the operator must see a reverse print, i.e. mirror image, of the map while he operates the machine. The machines shown in Plaintiff's and Defendants' patents are the same in this respect. The operator of both machines must see a mirror image of the map. In both machines, the map supporting table and overhead frame are facing toward each other so that the model which is cut will be a normal image of the mirror image map which the operator sees.

These facts are undisputed, and, as indicated above, the Defendant Neklason testified that a right reading print is mounted face down on the Defendants' table so that the machine operator will see a reverse print of the map.

Since the evidentiary facts are not in dispute, the Court's holding at CT. 33 that "Defendants do not employ such a reverse print" can be reversed. See Hansen v. Colliver, 282 F.2d 66, 69, 127 USPQ 32, 34 (9th Cir., 1960), where the Court said:

"Normally the question of infringement is one of fact. In this case, however, since the facts are not in dispute the question of infringement resolves itself into one of law, depending on a comparison between the patent claim in issue and the accused device, and the correct application thereto of the law of equivalency."

It will be recalled that the Defendants built two machines the first of which was identical to the machine shown in the patent except that it had an opaque table in place of the light table, and the Defendants' first machine was operated in exactly the same way as the Plaintiff's machine with a reverse print of the topographical map mounted

on the opaque table. When these two machines of the Defendants are compared, it is seen that the Defendants' first machine employed the entire structure and mode of operation of Plaintiff's machine, and Defendants' later development of the light table merely added a new feature to the machine in addition to all of the features of Plaintiff's machine which were already in the Defendants' first machine.

Thus, the Defendants' addition of the lights in the table merely helps the Defendants see through the paper on the table (the well-known function of a light table) to help the operator of the Defendants' machine see the reverse print of the topographical map through the paper. While this improvement may have been worthwhile and may have justified the allowance of a later patent to the Defendants, the law is well established that a late comer in the field does not avoid infringement by adding improvements, patentable or unpatentable to the inventions already made by his predecessors. As this Court said in No-Joint Concrete Pipe Co. v. Hanson et al, 344 F.2d 13, 15-16, 144 USPQ 519, 521 (9th Cir., 1965).

"That appellees may have found and patented an improved method of compacting concrete around the core does not preclude their one-

piece core from being the mechanical equivalent of appellants two-piece core."

In that case, the District Court's judgment that the patent was not infringed was reversed.

The fallacy of the District Court's decision in this case is indicated by the conflict between Findings of Fact Nos. 9 and 10. By Finding No. 9, the Court found that "literally, any table, including the lower table of Defendants' apparatus, is adapted to support a reverse print of a topographical map." The Court acknowledges that the Defendants' table fully satisfies the structural requirements of Claim 4 because the Defendants' table performs all of the functions performed by Plaintiff's table. The Defendants' table is adapted to support a reverse print, and where a reverse print is placed on the Defendants' table, the Defendants' machine operates exactly the way Plaintiff's machine operates. The lights in Defendants' table do not take away from the table any function of the table in Plaintiff's patent, and therefore, even though the Defendants may have added some feature to the patented invention, they have incorporated the entire patented invention into their machine.

Finding No. 10 is in fact inconsistent with Finding No. 9 since Finding No. 9 has stated in effect that the table and not the reverse print is a physical part of the machine invented by Plaintiffs, but Finding No. 10 comes to the opposite conclusion based on arguments that Plaintiffs represented to the Patent Office and the Patent Office understood that the reverse print itself was a physical part of the invention.

Plaintiff submits that Finding No. 10 is clearly erroneous since Plaintiff expressly represented to the Patent Office that the machine of these Defendants infringed the claims.

The argument of Plaintiffs' counsel quoted in Finding No. 10 does not reinforce a narrow construction of Claim 4 because the argument was not intended to imply that a transparent table and map could not be used in Plaintiff's invention. The argument was advanced to show that the rearrangement which the Patent Office Examiner proposed to make out of the structure of the Shaver patent would not work without a transparent table because the map and stylus which were on opposite sides of the table could not be seen at the same time.

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The use of a reverse print in Plaintiff's machine was an important factor in distinguishing the way in which Plaintiff's machine was used from the way in which the Shaver machine was used, but the use of the Defendants' machine distinguishes from Shaver in the same way. When the Shaver machine was used to make a topographical model, the operator of the machine saw a right reading print of the topographical map because the map supporting table and the model being made were facing in the same direction. However, when the Plaintiff's machine is used, and when the Defendants' machine is used, the operator sees a reverse print.

The Defendants Do Employ A Reverse Print In The Same Way That Plaintiffs Do.

The finding of the District Court that the Defendants do not use a reverse print because they mount a right reading print face down is clearly erroneous. As indicated above, the Defendants mount a right reading print face down for the purpose of permitting the machine operator to see a reverse print. Additionally, many topographical maps (up to 25% of the maps delivered to Plaintiff) are prepared in a manner that permits the map to be seen from both sides of the paper or plastic on

which it is prepared. When viewed from one side of the paper, the map may be a right reading print, but when viewed from the other side of the paper it is a reverse print. When the Defendants say they are mounting a right reading print face-down instead of mounting a reverse print face-up, they are saying that they call the map a right reading print because they have looked at the underside of the paper before they place it on the machine but that it is not a reverse print even though the operator operating the machine sees it as a reverse print.

The Rack And Pinion Structure Is The Equivalent Of A Jack Screw

Claim 11 is directed to the adjustable router assembly itself apart from the rest of the machine. This claim is limited in its wording to (a) an internally threaded sleeve such as the sleeve 24 in Fig. 2 of the patent, and (b) an externally threaded motor which is threaded into the sleeve as shown at 28 in Fig. 2, such being the means for effecting vertical adjustment by screwing the motor down or up out of the sleeve.

Plaintiff has contended that the Defendants' machine meets the literal terms of this claim because the sleeve 46

(Fig. 4 of EX. 8) in the Defendants' machine has threads in the form of the teeth on pinion gear 70 which project to the interior of the sleeve thereby making the sleeve an internally threaded sleeve though it is threaded in only one local area. The motor 60 is externally threaded by means of the teeth 52 on the rack gear though the "threads" on the Defendants' router assembly extend only along the length of the router housing and do not extend completely around the circumference of the housing.

Quite apart from the question of whether or not the Defendants' rack and pinion meets the literal terms of Claim 11, it is respectfully submitted that the Defendants' rack and pinion is the full mechanical equivalent of the screw threaded arrangement recited in the claims so the Defendants must be held to infringe the claim under the Doctrine of Equivalents.

The classic case on the Doctrine of Equivalents is Graver Tank & Mfg. Co, Inc., v. Linde Air Products Co., 339 U.S. 605, 85 USPQ 328 (Sup.Ct., 1950). Mr. Justice Jackson, speaking for the majority, applied the Doctrine of Equivalents to find infringement of patent claims. At the

outset of his opinion, Mr. Justice Jackson explained the Doctrine of Equivalents as follows:

"In determining whether an accused device or composition infringes a valid patent, resort must be had in the first instance to the words of the claim. If accused matter falls clearly within the claim, infringement is made out and that is the end of it.

"But courts have also recognized that to permit imitation of a patented invention which does not copy every literal detail would be to convert the protection of the patent grant into a hollow and useless thing. Such a limitation would leave room for--indeed encourage--the unscrupulous copyist to make unimportant and insubstantial changes and substitutions in the patent which, though adding nothing, would be enough to take the copied matter outside the claim, and hence outside the reach of law. One who seeks to pirate an invention,

like one who seeks to pirate a copyrighted book or play, may be expected to introduce minor variations to conceal and shelter the piracy. Outright and forthright duplication is a dull and very rare type of infringement. To prohibit no other would place the inventor at the mercy of verbalism and would be subordinating substance to form. It would deprive him of the benefit of his invention and would foster concealment rather than disclosure of inventions, which is one of the primary purposes of the patent system.

"The doctrine of equivalents evolved in response to this experience. The essence of the doctrine is that one may not practice a fraud on a patent. Originating almost a century ago in the case of *Winans v. Denmead*, 15 How. 330, it has been consistently applied by this Court and the lower federal courts, and continues today ready and available for utilization when the proper circumstances for its applica-

tion arise. 'To temper unsparing logic and prevent an infringer from stealing the benefit of an invention'¹ a patentee may invoke this doctrine to proceed against the producer of a device 'if it performs substantially the same function in substantially the same way to obtain the same result.' Sanitary Refrigerator Co. v. Winters, 280 U.S. 30, 42 [3 USPQ 40, 44]. The theory on which it is founded is that 'if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form, or shape.' Machine Co. v. Murphy, 97 U.S. 120, 125. The doctrine operates not only in favor of the patentee of a pioneer or primary invention, but also for the patentee of a secondary invention consisting of a combination of old ingredients which produce new and useful results, Imhaeuser v. Buerk, 101 U.S. 647, 655, although the area of equivalence may vary under the circumstances." 339 U.S. 607-608, 85 USPQ 330.

The District Court below held that Claim 11 of the patent was entitled a "most meager range of equivalents" because of the District Court's understanding that "Plaintiff has never incorporated the principle of vertical adjustment of the router assembly in a working model." See the last paragraph at CT. 35. The District Court's factual basis for this holding was, however, inaccurate. While the fact was not stressed by either party at the trial, Plaintiff's second machine which is shown in the photograph facing Page 8 of this Brief includes a rack and pinion which provide a vertical adjustment in the router assembly. The machinist who made that machine so testified at EX. 28, Pp. 18-21, and both of the attorneys for the Defendants have examined that machine. Thus, the District Court was in error in the factual premise on which the "most meager range of equivalents" was based.

In fact, the jack screw shown in Fig. 2 of Plaintiff's patent and the rack and pinion employed in the Defendants' machine are the full equivalents of each other. Both devices are centuries old and have been used interchangeably in many environments. Plaintiff did not invent the screw arrangement shown in Fig. 2, and Defendants did not invent the rack and pinion. As indicated above, Defendant Neklason

testified that the importance of the rack and pinion in Defendants' machine was the fact that it provided a vertical adjustment of some kind in the router assembly and the rack and pinion itself was old. See also, Encyclopedia Britannica, William Benton, Publisher (1958), Volume 12, Page 850, where the entry under the term "JACK" includes inter alia the following:

"There are many different applications of "jack" to certain levers and other parts of textile machinery; the principal mechanical application of the word, however, is to a portable hand-worked appliance for raising weights from below. Jacks range in power from a few hundred weights to 500 tons; the simple type is a crow-bar pivoted in an upright frame, giving a direct and rapid lift. To this simple pivoted lever have been added a screw turned by a tommy-bar, ratchet devices, pinion and rack, etc., for increasing power or rapidity of action; and special forms have been evolved for use with motor cars, tram-cars, cable-drums, locomotives, railway and tram rails, ships, etc." (Emphasis added)

In the Plaintiff's and Defendants' machines, the screw threaded arrangement and rack and pinion perform substantially the same function in substantially the same way to obtain the same result. That is, the two devices operate to change the depth of cut of the cutting tool by rais-

ing and lowering the router motor to provide an accurate vertical adjustment in the router assembly itself, Under these circumstances, the Doctrine of Equivalents must be applied to find infringement. See: Hansen v. Colliver, 282 F.2d 66, 127 USPQ 32 (9th Cir., 1960) where Judge Jertberg said at 127 USPQ 34; (282 F.2d 69)

"In our view the proper construction of claim 1 requires a 'guide' but does not require a guide of any specified shape or form or that the rope shall be guided by any particular means. While we are inclined to disagree with the view of the district court that the table top of the appellees' device is not a guide and therefore does not literally infringe appellant's patent, we are wholly satisfied that the undisputed facts compel the application to this case of the doctrine of equivalents. The doctrine is applicable if the accused device performs substantially the same function in substantially the same way to obtain the same result as that claimed for the patented device. (Citing Cases).

"Normally the question of infringement is one of fact. In this case, however, since the facts are not in dispute the question of infringement resolves itself into one of law, depending on a comparison between the patent claim in issue and the accused device, and the correct application thereto of the law of equivalency." (Citing Cases).

See also: Filtex Corp. v. Atiyeh , 212 F.2d 443,
103 USPQ 197 (9th Cir., 1954).

In connection with the lower court's conclusion of non-infringement of Claim 11, Plaintiff respectfully submits that this conclusion of non-infringement cannot be affirmed because it is not supported by proper findings of fact. The only finding of fact which could be construed to relate to application of the Doctrine of Equivalents to Claim 11 is Finding No. 13 which is conclusionary and not a proper finding of fact.

The Limitations Of Narrow Claim 11 Cannot Be Read Into
Broader Claim 14.

As indicated by Finding No. 14 (CT. 43), Claim 14 is broader than Claim 11 in that it recites the vertical adjusting means in the router assembly in broad terms whereas Claim 11 defines the vertical adjusting means in terms of the specific screw threaded sleeve and screw threaded motor illustrated in Fig. 2.

Notwithstanding the fact that Claim 14 is broader than Claim 11, the lower court found in Finding No. 14 that

"it follows that Claim 14 is no broader in scope than Claim 11 . . ." contrary to a long line of precedents. See: Smith v. Snow, 294 U.S. 1, 24 USPQ 26 (Sup.Ct., 1935) where Mr. Justice Stone, speaking for a unanimous court said at 24 USPQ 31, 294 U.S. 13, 14.

"It is evident that Claim 1 does not prescribe that the current of air shall be propelled by any particular means, except that it shall be by means other than variation of temperature, nor does it prescribe that the means of propulsion shall be given any particular location, or that the current of air shall be guided by any particular means or given any particular direction. The omission of these requirements from Claim 1 is the more pointed as the other claims of the patent speak in particular of a power-driven fan, of the location of the fan, of curtains and a partition obviously intended to give direction to

the current of air, of a vertically directed current of air, and of air circulating from the bottom of the chamber into the parts of it occupied by the tiers of egg trays. Thus by striking and obviously intended contrast with other claims, Claim 1 covers broadly the essential elements of the Smith invention as we have already described it." (Emphasis added)

See also Kennedy v. Trimbel Nursery Yard Furniture, Inc., 99 F.2d 786, 39 USPQ 506 (2nd.Cir., 1938); Great Lakes Equipment Co. v. Fluid Systems, 217 F.2d 613, 104 USPQ 40 (6th.Cir., 1954); Cameron Iron Works v. Stekall, 242 F.2d 17, 112 USPQ 411 (5th.Cir., 1957); Stearns v. Tinker & Rasor, 252 F.2d 589, 116 USPQ 222 (9th.Cir., 1957); Hansen v. Colliver, 282 F.2d 66, 127 USPQ 32 (9th.Cir., 1960).

The error of the District Court in limiting Claim 14 to the scope of Claim 11 is apparent when we examine the reason why the lower court held the scope of Claim 11 to be narrow. Claim 11 recites the screw threaded arrangement

shown in Fig. 2, and the District Court held the claim to be entitled to only a narrow range of equivalents because Plaintiffs had never built the screw threaded arrangement. On the other hand, the definition of the vertical adjustment structure is much broader in Claim 14 and is broad enough to cover by its express terms the rack and pinion structure which is incorporated in the Defendants' machine and which was incorporated in the Plaintiff's second machine. Since Plaintiff has built and used commercially a structure falling within the definition of the vertical adjusting means in Claim 14 there is no reason for applying to Claim 14 the "paper patent" argument for a narrow range of equivalents.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment of the District Court holding Claims 4 and 5 not infringed should be reversed because the scope of claims which the Plaintiff seeks by way of judgment of this Court is no broader than and is fully commensurate with the scope represented to and understood by the Patent Office when the Patent Office granted the petition to make special. The decision of the District Court as to Claims 11 and 14 should be

reversed because the Defendants' rack and pinion is the full equivalent of the jack screw shown in Fig. 2 of Plaintiff's patent, and Claim 14 which is literally broader than Claim 11 must be given a scope which is also broader than Claim 11.

Dated: San Francisco, California

October 18, 1967.

Respectfully submitted,

NAYLOR & NEAL
Karl A. Limbach, Esquire

By Karl A. Limbach
Attorney for Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those Rules.

Karl A. Limbach
Attorney for Appellant

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I have mailed three copies of the foregoing Brief to Harvey G. Lowhurst, 2500 El Camino Real, Palo Alto, California, this 18th day of October, 1967.

Karl A. Limbach
Attorney for Appellant

APPENDIX I

4. Apparatus for making three dimensional topographical models which comprises:

a support frame having;

a generally horizontal table thereon adapted to support a reverse print of a topographical map representing the model which is to be made;

work holding means rigidly mounted on said frame above said table for supporting above said table a mass of material from which said model is to be made;

a tool carrier resting on said table and freely movable over the surface of said table;

an electric motor mounted on said tool carrier and having;

a tool receiving chuck mounted thereon for rotation about a generally vertical axis responsive to operation of said motor,

a rotary tool received in said chuck and projecting upwardly from said motor and movable over said table with said carrier, said tool generating a cylindrical cutting shape responsive to operation of said motor,

a generally circular stylus mounted on said carrier adjacent to said table with said stylus being coaxial with said axis of rotation of said chuck and having a diameter substantially equal to the diameter of said cutting shape and with both said chuck and said stylus positioned between said table and said work holding means; and,

adjusting means forming a part of said carrier for changing the distance between said cutting tool and said table.

5. The apparatus of Claim 4 characterized further in that said tool is mounted on said motor in fixed space relation to said motor axially thereof, and said adjusting means comprises means for moving said motor with respect to said carrier along a direction generally parallel to said axis of rotation.

11. A tool for making three dimensional topographical models which comprises:

a frame having;

a base portion adapted to rest on and be moved freely over a flat surface;

an internally threaded sleeve rigidly mounted on said base portion and having a central axis generally perpendicular to said base portion;

an electric motor threadedly received in said sleeve and having;

a tool receiving chuck extending therefrom away from said base portion and rotatable about said axis responsive to operation of said motor,

a rotary tool received in said chuck and generating a cylindrical cutting shape responsive to operation of said motor; and,

a generally cylindrical stylus mounted on said frame between said base portion and said motor and having a generally circular stylus end adjacent to said base portion with said stylus end being coaxial with said axis and having a diameter substantially equal to the diameter of said cutting shape.

14. A tool for making three dimensional topographical models which comprises:

a frame having;

a base portion adapted to rest on and be moved freely over a flat surface;

a body portion mounted on the base portion;

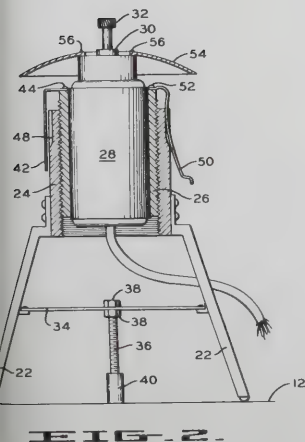
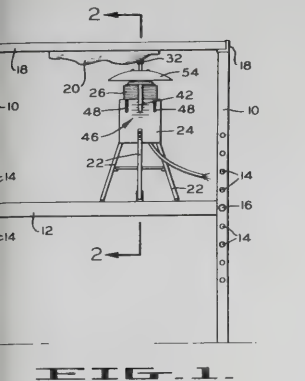
a router mounted on said body portion and having;

a cutting tool thereon facing away from said base portion with said router positioned for rotating said tool about an axis generally perpendicular to the flat surface on which said base portion rests;

adjustable connecting means interconnecting said router and said body for adjustably positioning said router as a plurality of different positions along said axis; and,

a generally cylindrical stylus mounted on said base portion adjacent to the surface on which said base portion rests with said stylus having a circular end coaxial with said axis and equal in diameter to the diameter of said tool.

PLAINTIFF'S MACHINE



Claim 4

The frame called for by Claim 4 is indicated by number 10 in Plaintiff's machine and number 18 in Defendants' machine. The table is numbered 12 in Plaintiff's machine and 12 in Defendants' machine. The work holding means is numbered 18 in Plaintiff's machine and 14 in Defendants' machine. The tool carrier is the entire device illustrated in Fig. 2 for Plaintiff's machine and the device number 10 in Fig. 1 and illustrated in Figs. 2 and 4 for Defendants' machine. The electric motor is numbered 28 in Plaintiff's machine and 60 in Defendants' machine. The tool receiving chuck is numbered 30 in Plaintiff's machine and 62 in Defendants' machine. The rotary tool is numbered 32 in Plaintiff's machine and 22 in Defendants' machine. The stylus is numbered 40 in Plaintiff's machine and 38 in Defendants' machine. The adjusting means forming part of the carrier for changing the distance between the cutting tool and the table comprises the threaded connection between elements 24 and 26 in Plaintiff's machine and comprises the rack 52 and pinion gear 70 in Defendants' machine.

DEFENDANTS' MACHINE

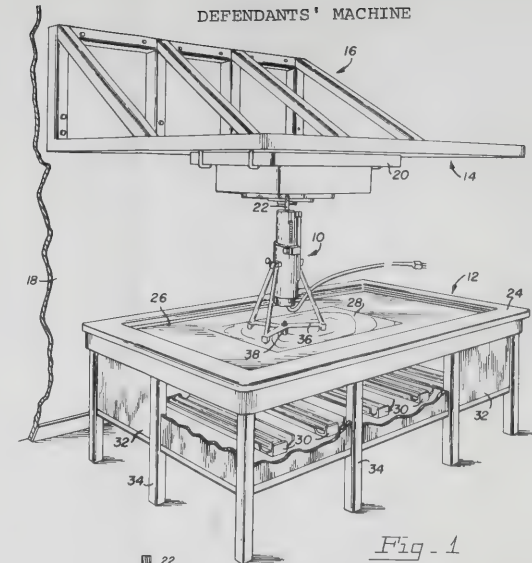


Fig. 1

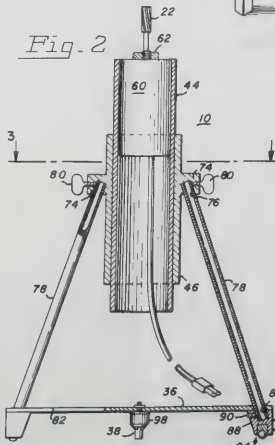


Fig. 2

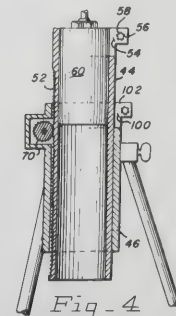


Fig. 4

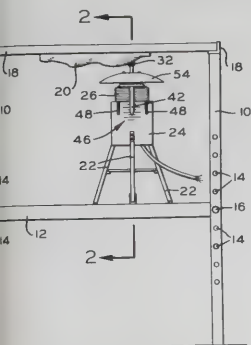


FIG. 1.

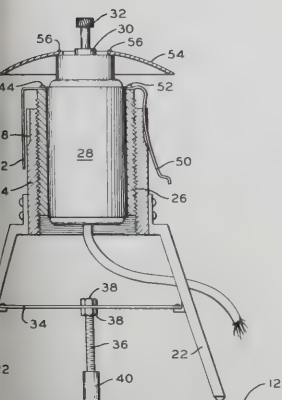


FIG. 2.

The structural elements recited in Claim 14 are found in the two machines as follows: the frame includes the legs 22 in Plaintiff's machine and the feet 88 in Defendants' machine. The body portion is numbered 24 in Plaintiff's machine and 46 in Defendants' machine. The router is numbered 28 in Plaintiff's machine and 60 in Defendants' machine. The cutting tool is numbered 32 in Plaintiff's machine and 22 in Defendants' machine. The adjustable connecting means interconnecting the router and the body comprises the threads on the inside of element 24 and the outside of element 26 in Plaintiff's machine and comprises the gear teeth on the rack gear 52 and pinion gear 70 in Defendants' machine. The stylus is number 40 in Plaintiff's machine and 38 in Defendants' machine.

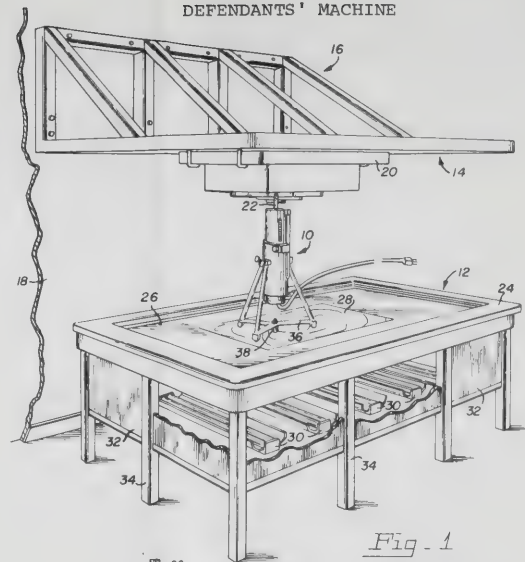


Fig. 1

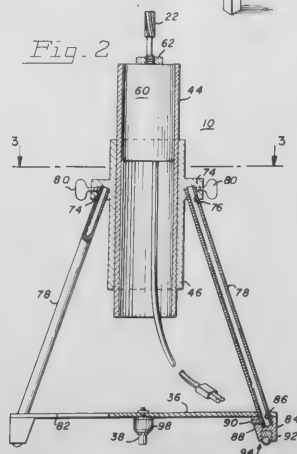


Fig. 2

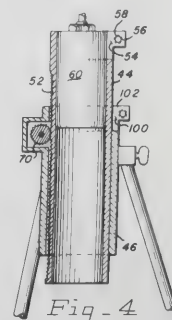


Fig. 4

Claim 5

Claim 5 does not recite any new structural elements not recited in Claim 4 but merely recites a physical relation between the structural elements by requiring that the motor is mounted in the tool carrier to be moved vertically up and down.

Claim 11

Claim 11 is similar to Claim 14 but more detailed in its definition of the vertical adjusting means. Claim 11 requires that the body 24 (called a sleeve in the claim) be internally threaded and that the motor 26-28 be externally threaded. The body or sleeve 26 in Defendants' machine has internal threads only where the pinion gear 70 projects to the interior of the body 46, and the motor 60 with its outer sleeve 44 is externally threaded only along the line of rack gear 52 where it contains gear teeth.

APPENDIX III

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<u>Plaintiff's Exhibits</u>	<u>Description</u>	<u>Identified</u>	<u>Introduced In Evidence</u>
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G	Neklason Time Sheet	233	437
H	Edward Lee Time Sheet	271	---
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J	Copy Five Pages of Pl's Invoice Book	303	438
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N	Letter Lowhurst to Limbach	630	636
O	Sketch by Mr. Naylor	57	99
Q	Copy Drawing Fig. 1 Neklason Pat. Appln.	80	99

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Y	Photograph of Queen Emma Model	328	440
AA	Photo Anshen & Allen Model	329	440
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VV	Copy of Page 42 of Trial Brief	318	442
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<u>Defendants' Exhibits</u>	<u>Description</u>	<u>Identified</u>	<u>Introduced In Evidence</u>
2	File Wrapper	161	163,445
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3-B	Shaver Patent	717	807
3-C	Howard Patent	---	807
3-D	Woody Patent	---	807
3-E	Bates Patent	---	807
3-F	Smith Patent	---	807
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NO. 21,826

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARCHITECTURAL MODELS, INC.,
a California corporation,

Appellant,

v.

NILS C. NEKLASON and
DONALD NUSBAUM doing business
as SCALE MODELS UNLIMITED,

Appellees.

APPELLEES' BRIEF

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FILED

NOV 30 1967

WM. B. LUCK, CLERK

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UNITED STATES COURT OF APPEALS
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ARCHITECTURAL MODELS, INC.,
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APPELLEES' BRIEF

In conformity with Appellant's Opening Brief, this brief will refer to the Clerk's Transcript as CT and to the Reporter's Transcript as RT. Appellant will be referred to as Plaintiff and Appellees as Defendants. The patent in suit, Green and Johnson U.S. Patent No. 3,137,209 will be referred to as "the patent".

JURISDICTION

The basis of jurisdiction in the court below and in this court are correctly stated in Appellants' Opening Brief (hereinafter referred to as Pl's Brief).

STATEMENT OF THE CASE

Appellant's (Plaintiff's) statement of the case is highly selective and does not give an adequate picture of the state of facts upon which Judge Harris based his opinion, findings of fact, conclusions of law and judgment. Therefore, at the expense of some repetition, it is essential for Defendants to give their version of the case.

The Background of Plaintiff's Invention

It was not original with Plaintiff to make models of plastic by a technique in which the plastic is cut with a machine, in which the machine traces the lines of a contour map with a stylus and simultaneously cuts the plastic with a tool, and in which the cutting tool duplicates the motion of the stylus.

This technique was revealed to Plaintiff by two gentlemen from Pullman, Washington, whose purpose was to interest Plaintiff in having its topographical models made by them. In the course of trying to gain the patronage of Plaintiff these gentlemen told Plaintiff about this technique. However, instead of giving these gentlemen the business they desired, Plaintiff decided to appropriate this technique to its own use. (RT 111-113)

The owners of Plaintiff, Virginia Green and Leila Johnston, did not like the machine (a pantograph) these men were using. (Pl's Brief, page 5; RT 239-240) They thereupon consulted with the father of Virginia Green, a Mr. Elliott Dorsey Green. Elliott Dorsey Green told them two important things, as follows:

- (1) Mount the work piece (i.e., the plastic to be cut) above the topographical map; and
- (2) use a reverse print of the map.¹ (RT 116-117, 451)

1. There is disputed evidence that Elliott Dorsey Green suggested other things, but as to the above facts and as to other facts set forth hereinafter regarding contributions of others (i.e., persons other than Leila Johnston and Virginia Green) there is no dispute.

Virginia Green and Leila Johnston took the several ideas which they had derived from the gentlemen from Pullman and from Elliott Dorsey Green, together with any ideas they may have originated themselves, to a machine shop operated by a father and his son, Roger N. Busch and Roger H. Busch, respectively. Johnston and Green gave the Busches the job of building the machine. In so doing, and without any question, the Busches originated the idea of the jack screws 60, the sprockets 62 and 70, the chain 66 and the hand wheel 72 shown in Figures 3 and 5 of the patent. These elements are the means whereby the top support 18 and the slab of plastic 20 (see Figure 3 of the patent) are raised and lowered to move from one contour level to the next. RT 125-126, 425, 500-501.

This machine, built and contributed to by the Busches, was delivered to Plaintiff in June of 1960. RT 357 In April of 1961, during a conference between Virginia Green, Leila Johnston and their patent attorney, the alternative structure of Figure 2 was conceived. This was a conception of Virginia Green; it was not conceived by Leila Johnston. RT 71, Pl's Exhibit O.

Thereafter, on July 27, 1961, Virginia Green and Leila Johnston filed an application as joint inventors describing the structure of Figures 3, 4 and 5 of the patent built by the Busches and the alternative structure of Figures 1 and 2, such

application combining and claiming in various ways the concepts of the gentlemen from Pullman, the father of Virginia Green and the Busches, and any ideas that may have been contributed by Virginia Green.²

In January of 1964, while their application was still pending in but had been allowed by the Patent Office, Virginia Green and Leila Johnston were aware that there was some question concerning inventorship. RT 414-415. In fact at that time Green and Johnston gave the matter of inventorship "specific consideration". RT 414-417. They gave specific consideration to "the fact that Virginia (Green) and I (Leila Johnston) do agree that her father (Elliott Dorsey Green) contributed this marvelous idea of putting the material upside down--" RT 414-415. At that time Virginia Green, Leila Johnston and Plaintiff might have taken steps under the provisions of 35 USC 116, to correct an error in inventorship but they did nothing in this regard.³

2. In this connection, it is beyond dispute that, in actual fact, Leila Johnston contributed nothing of an inventive character. RT 126-130.
3. The controlling statute, 35 USC 116, third paragraph reads as follows:

"Whenever a person is joined in an application for patent as joint inventor through error, or a joint inventor is not included in an application through error, and such error arose without any deceptive intention on his part, the Commissioner may permit the application to be amended accordingly, under such terms as he prescribes." (Continued on Page 6.)

Instead they caused the application to issue as the patent which is involved in this suit, (RT 428) claiming the device of Figures 3, 4 and 5 and the device of Figures 1 and 2, such claims incorporating as elements or features such things as the jack screw adjustment of the Busches and the ideas of mounting the plastic workpiece overhead and the use of a reverse print as suggested by Elliott Dorsey Green.

The claims of this patent are replete with recital of features contributed by other persons. For example, (1) Claims 1-10 recite the "reverse print" feature which looms large in this case; (2) all of the claims recite or imply that the workpiece is situated above the topographical map; and (3) Claim 9 broadly describes and Claim 10 specifically describes the jack screw mechanism for raising and lowering the workpiece. The first two of these three features were contributed by Elliott Dorsey Green and the third feature was contributed by the Busches. None of these persons was named as an inventor. Inspection of the file

Foot note 3, Continued from Page 5

There is a serious question whether the omission of Elliott Dorsey Green and the Busches as inventors was "error" and that it arose "without any deceptive intention". As noted in the text above, Johnston and Green regarded Elliott Dorsey Green's contribution as being a "marvelous idea". During 1960 (before the application was filed) Virginia Green told a lot of people that the machine was her father's idea. RT 412, 506, 601. Commencing about September 1961, shortly after the application was filed and following the death of Elliott Dorsey Green, Plaintiff commenced paying his widow \$150 per month identified on Plaintiff's income tax records as patent royalties for the patent in suit. RT 163-164, 208-210, 418.

wrapper, Defs' Exhibit 2, reveals that nothing was said to the Patent Office regarding contributions of these men and no attempt was made to distinguish in the Patent Office between what these men contributed and what Virginia Green and Leila Johnston contributed.

Another interesting fact which is not touched on in Plaintiff's brief is as follows: Claim 14 is one of the claims sued upon and like Claim 11 (another claim sued upon) it is directed to the apparatus of Figure 2, that is, the adjustable router assembly per se. However, Claim 14 differs from Claim 11 in that it does not specifically recite a threaded relation between the router and its holder or stand. This claim was first presented to the Patent Office on September 12, 1963 after Plaintiff had demanded and had been given access to Defendant's machine. (File wrapper of the patent, Defs' Exhibit 2, pages 28-29.) If, as Plaintiff contends, Claim 14 expresses a broader concept than Claim 11, that broader concept was not presented to the Patent Office until after Plaintiff had seen Defendants' device. It appears to have been a deeply rooted habit of Plaintiff to funnel ideas contributed by others (by the gentlemen from Pullman, by Elliott Dorsey Green, by the Busches and even by the Defendants) into their patent.

Defendants' Machine

Defendants, like Plaintiff, did not start from first principles. They had, during their employment by Plaintiff, learned of Plaintiff's machine just as Plaintiff had learned of the machine used by the gentlemen from Pullman and as Plaintiff benefitted from the ideas of Eliott Dorsey Green and the Busches. At this point it should be noted that, in its complaint, Plaintiff charged Defendants with unfair competition in the sense that Defendants had appropriated a trade secret (the structure of Figures 1 and 2 of the patent) of Plaintiff. Judgment was against Plaintiff on that count. CT 50,53. No appeal has been taken from that judgment.

Defendants, however, also exercised their own ingenuity. They conceived of the idea of a rack and pinion to move their router, Defs' Exhibit 25, up and down and they did so independently, without knowledge of Plaintiff's Figure 2 router. See Finding of Fact No. 23, CT 45, 46, which is not challenged by Plaintiff. Also Defendants conceived of the use of a light table to transmit light through a right reading print (i.e., an original or positive rather than a reverse print) placed face down on the table, thus avoiding the need to prepare and use a reverse print. This is

shown facing page 13 of Pl's Brief and in Figure 1 of a patent separately granted to Defendants on this light table, Defs' Exhibit 8, U.S. Patent 3,224,339. Among advantages of the rack and pinion feature are the much greater speed at which it can adjust height as compared to the jack screw, chain and spocket arrangement of Figures 3 to 5 and the screw-in arrangement of Figures 1 and 2 of the patent. See testimony of Nusbaum at RT 690-692, 700-711. Mr. Nusbaum demonstrated Defendants' router, Defs' Exhibit 25, in court. Among the advantages of the use of the light table and a right reading print are that topographical maps are often supplied as right reading prints and, if reverse prints must be made, their preparation is time consuming and expensive. Nusbaum testimony at RT 686,687. This testimony and demonstration were, of course, heard and weighed by the trial court.

The record shows that Defendants did not copy anything originated by the patentees Virginia Green and/or Leila Johnston. The use of plastic and cutting it with a machine which would follow the contour lines of a topographical map with a stylus and at the same time correspondingly cut the plastic, was contributed by the gentlemen from Pullman, Washington. (This brief at pages 2-3, supra.) In mounting the plastic above the topographical map Defendants followed the suggestion of Elliott

Dorsey Green (page 3 , supra) and adopted the technique shown in a prior patent, Jacobson patent 429,213, Defs' Exhibit 4; testimony of Nusbaum at RT 717-719. In putting the height adjustment into the router assembly rather than into the heavy framework of the machine, Defendants struck out on their own because, at that time, they did not know of Plaintiff's Figure 1 and 2 structure (page 8 , supra). In employing a light table and using a right reading print placed face down on the table, Defendants also struck out on their own and have received a patent for their contribution. Def's Exhibit 8.

SUMMARY OF ARGUMENT

The crucial findings of fact with respect to Claims 4 and 5 are that they were amended to recite a "reverse print"; that such was done to dissuade the Patent Examiner from a rejection of these claims and to persuade him that an apparatus employing a "reverse print" is different from and patentable over an apparatus that does not employ a "reverse print"; and that Defendants apparatus does not employ a "reverse print". There is no dispute about these facts. The trial court correctly applied the law to the facts in holding that Defendant's device does not infringe Claims 4 and 5.

The crucial findings with respect to Claim 11 are that it is limited by its language to a screw-in mechanism for height adjustment of the router; that this device was never used and Claim 11 is therefore a paper patent; that it is in a crowded art; and that Defendants height adjustment by means of a rack and pinion is different and is not the equivalent of Plaintiff's screw-in mechanism. The trial court correctly applied the law to the facts.

The crucial holding with respect to Claim 14 is that its "means" clause defining the height adjustment must, according to law, be interpreted as covering only the structure specifically shown (a screw-in mechanism) and equivalents; and that the facts and law applicable to Claim 11 are applicable to Claim 14.

ARGUMENT

Summary of Evidence Concerning the Structure, Operation and Performance of Plaintiff's and Defendants' Machines

At the trial, which occupied seven days, several witnesses testified in court concerning the background and development of Plaintiff's machine; the background and development of Defendants' machine; the performance of the machine of Figures 3 - 5 of the patent; the probable performance of the machine of Figures 1 and 2 of the patent ("probable" because that machine was never built); and the performance of Defendants' machine. These witnesses and places in the record where pertinent testimony is set forth, are as follows:

Leila Johnston	}	Owners & Officers of Plaintiff and joint patentees	RT 115-116, 135, 137, 166, 167, 169-179, 261, 423-424 RT 450-464, 500-501
Virginia Green			
Donald Nusbaum	}	Defendants	RT 683-713, 790 RT 602
Nils Neklason			
Richard Wold)	A witness for Plaintiff	RT 569-570

Moreover, prior art in the form of prior U.S. and foreign patents (Defs' Exhibits 3A-3I and 4-7) and a brochure (Defs' Exhibit 24) of a supplier of cutting tools (the Skill Company, which supplies the essential part of the machine that does the cutting) were offered and received in evidence in connection with testimony on direct and cross examination by Donald Nusbaum. See RT 717-728, 742-787.

This evidence is discussed in more detail in subsequent sections of the Argument.

The Trial Court's Opinion, Findings of Fact and
Conclusions of Law

Plaintiff's brief does not do justice to Judge Harris' carefully drafted opinion, findings of fact and conclusions of law.

At CT 32, third paragraph, the opinion states that only four of the fourteen claims of the patent (Claims 4, 5, 11 and 14) are sued upon and are "the only ones about which Plaintiff has presented evidence".

At CT 32, last paragraph and CT 33, first paragraph, the opinion carefully points out why the trial court limited its judgment to non-infringement and did not decide the issues of validity or misuse. This is important in view of a recent decision by this court, Illinois Tool Works v. Brunsing, 378 F 2d 234, 153 USPQ 771, CA 9, 1967. In that case, a judgment of non-infringement had been rendered after a separate trial of the infringement issue, the issue of validity having been raised by way of a counterclaim. This court, per Judge Hamley, (sitting with Judges Hamlin and Duniway) remanded the case to the trial court to comply with Rule 54(b) FR Civ.P; that is, to determine the issue of validity or to make an express determination that there was no just reason for delay.

In the present case Judge Harris clearly made such a determination and has complied with Rule 54(b). Thus Judge Harris said at CT 32:

"---this court concludes that the circumstances and factual background of the case dictate a disposition on the ground of non-infringement without deciding the question of validity of the patent."

And in Finding No. 35, CT 49, Judge Harris found that:

"No useful purpose would be served by rendering a declaratory judgment of invalidity or non-infringement of Claims 1-3, 6-10, 12 or 13 of the Green et al patent."

Moreover, Defendants through their counsel hereby stipulate that, if the judgment of the lower court is affirmed, they will dismiss their counterclaim. That will dispose of all issues.

The Issue of File Wrapper Estoppel - The Phrase "Reverse Print"

This issue concerns Claims 4 and 5 (numbered as Claims 5 and 6 while pending in the Patent Office) and is the subject of Findings Nos. 8, 9 and 10. These findings appear at CT 41-42 and they are reproduced below for convenience of reference:

"8. Claims 4 and 5 are to the apparatus as a whole, including the framework which supports a contour map on a table below and a workpiece above, as well as the router assembly. Each of these claims states that the map supporting table is 'adapted to support a reverse print of a topographical map.'"

"9. Literally, any table, including the lower table of defendants' apparatus, is adapted to support a reverse print of a topographical map."

"10. However, this feature - 'adapted to support a reverse print of a topographical map' - was introduced by amendment to overcome a ground of rejection and it was emphasized during prosecution of the patent application in the Patent Office as a feature which distinguishes the invention from the cited prior art. To give Claims 4 and 5 a broader interpretation and, in effect, to treat the language "adapted to support a reverse print of a topographical map" as meaningless surplusage would be to give these claims a broader scope than represented to and understood by the Patent Office and would recapture subject matter that was relinquished in the Patent Office in order to obtain allowance of claims. More particularly, to give Claims 4 and 5 a scope which would cover defendants' apparatus, in which there is a translucent table equipped with lights beneath (such being referred to as a "light table"), and which makes it possible to use a positive or right reading map with its attendant advantages over the use of a reverse print, would be to give

Claims 4 and 5 a scope broader than was intended by the Patent Office and broader than was represented by the plaintiff to the Patent Office. Such narrow construction of Claims 4 and 5 (as excluding defendants' light table and use of a right reading print) is reinforced by the following argument presented by plaintiff to the Patent Office (see the file of plaintiff's patent, Defs' Exh. 2, page 63):

'Thus, the modification of Shaver to incorporate opposed tool and stylus from Woody would require the conception of a method of use of the apparatus which would not be obvious to a man skilled in the Art. If a man skilled in the art did not conceive of applicants' method of using a reverse print, he would have to conceive of some other unobvious modification of Shaver, such as making the table 14 and map 10 transparent, in order to permit the Woody structure to be used in the Shaver apparatus.'

'The references 'Shaver' and 'Woody' in the above excerpt are to two patents cited by the Patent Examiner and which Plaintiff sought to overcome by arguments including the argument quoted above.'

To understand more fully the issue that existed between the Patent Office and Plaintiff until it was resolved by insertion of the words "reverse print", it is necessary to examine the Shaver patent and the position taken by the Examiner regarding that

prior patent. Figure 1 of the Shaver patent is reproduced as a fold-out page following this page.

As will be seen, in Shaver the map is on top, marked as "pattern" on the fold-out page, and the workpiece is at the bottom (marked as "work"). A stylus 48 (so marked) traces the contour lines of the map and a cutting tool 28A (so marked) cuts the workpiece correspondingly.

This differs from Plaintiff's structure in two respects: First, the tool and stylus in Shaver face in the same direction (upwards), whereas in Plaintiff's structure they face toward one another. Second, the map is on top and the workpiece is below in Shaver, whereas in Plaintiff's device the workpiece is on top and the map is below. The Examiner contended (see e.g., Def's Exhibit 2, page 19) that Plaintiff's rearrangement of parts was not a patentable invention.

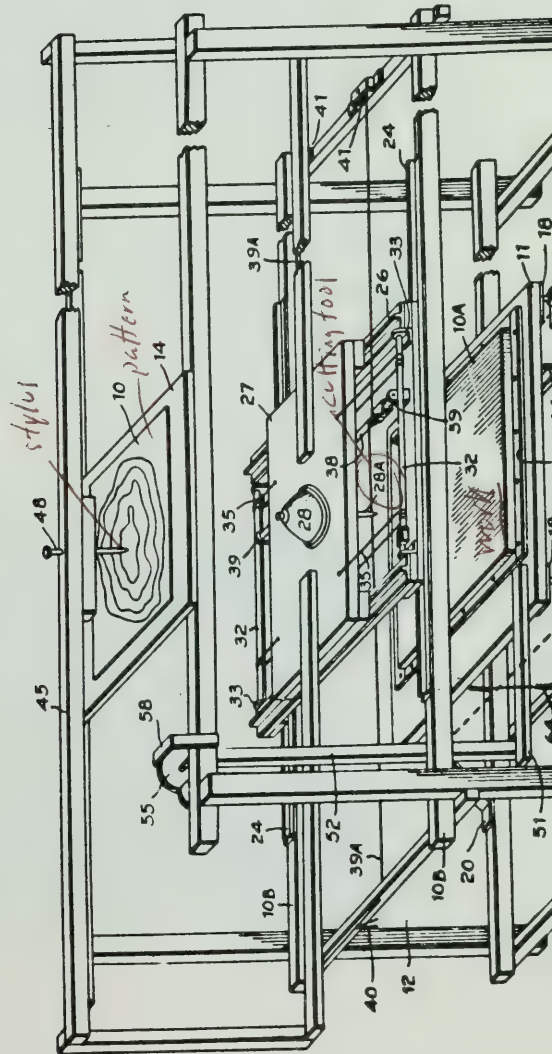
Plaintiff responded forcefully in the Patent Office that its invention did not reside merely in a rearrangement of parts but, on the contrary, it embodied something new, namely, the use of a "reverse print". At one stage of the prosecution of the application the following argument was made:

May 2, 1933.

P. A. SHAVER

DEVICE FOR MAKING RELIEF MAPS FROM CONTOUR

Filed May 20, 1929



BY-2



May 2, 1933.

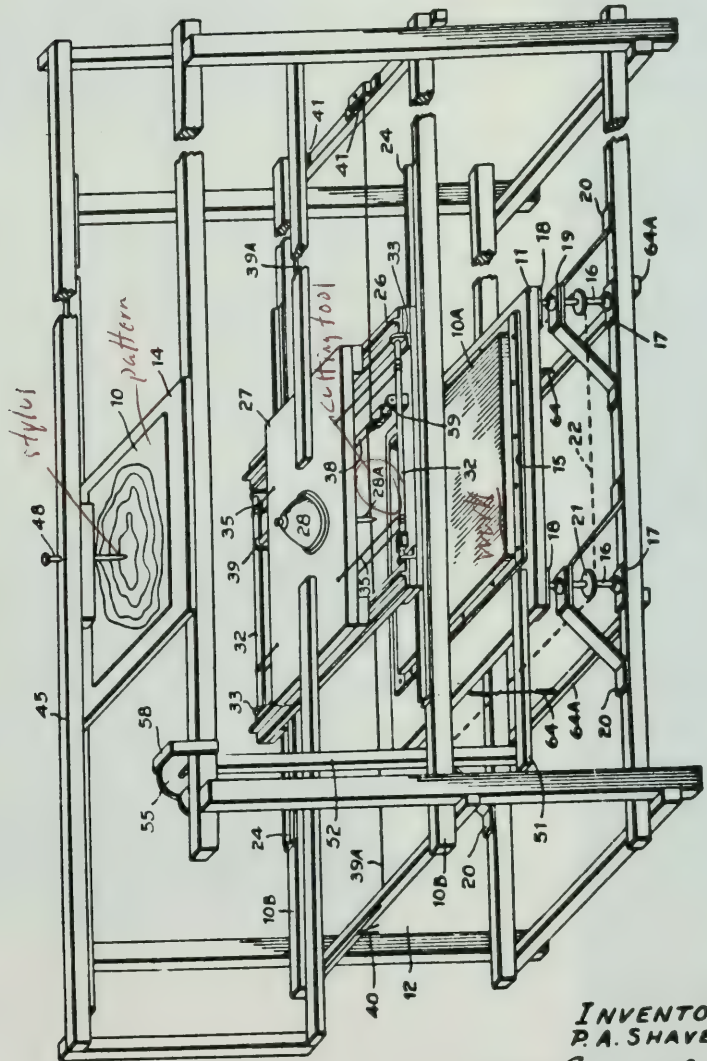
P. A. SHAVER

1,907,250

DEVICE FOR MAKING RELIEF MAPS FROM CONTOUR MAPS

Filed May 20, 1929

2 Sheets-Sheet



INVENTOR
P. A. SHAVER.

BY-*Lucas & Lavery*
ATTORNEY

"The apparatus claims differ from Shaver much more substantially than merely by the reversal of the positions of the tables 10 and 11 since applicants' mounting of the tool and stylus both between the two tables results in a substantially different manner of operation of the apparatus, for instance, in that applicants employ as a pattern not an ordinary topographical map as employed by Shaver but instead a reversed print of such a map (see page 3, line 10 at et seq). For these reasons, it is respectfully submitted that it would not be obvious to one skilled in the art to construct the apparatus claimed from a prior knowledge of Shaver."
(Defs' Exhibit 2, page 23).

Again, while the application was before the Patent Office Board of Appeals, Plaintiff presented the following argument. (In this excerpt, words and phrases directing attention to the reverse print feature and its importance are underscored, such underscoring not being in the original.)

"Furthermore, applicants' device and the Shaver device differ substantially in that this pattern used in applicants' device must be a photographic reverse print whereas the pattern in the Shaver device is not a reverse print. If a man skilled in the art is to consider employing the oppositely facing tool and stylus of Woody in the Shaver apparatus, he must conceive of the operational method applicants' employ where a reverse print of the topographical map is made for use with the apparatus. It is respectfully submitted that the conception of employing a reverse print of the topographical map or pattern is an antecedent to conception of applicants' apparatus which makes the conception of applicants' apparatus unobvious from the references. Thus, the apparatus as it is claimed recites a tool and stylus facing in opposite

directions for use with a reverse print of a topographical map. While Woody shows tool and stylus facing in opposite directions, neither of the references shows any contemplation of the use of a reverse print pattern. The Woody device might inherently require the use of a reverse print pattern if a pattern like Shaver's were employed, but the pattern used in the Woody device is totally unrelated to the type of pattern which is used in making topographical models. Because the groove 21 in the Woody template is symmetrical on both sides of the axis of the bearing 11, the Woody device does not have any pattern component which needs reversal because of the oppositely facing arrangement of the tool and stylus. In a reverse print pattern, portions of the pattern are reversed right to left along both horizontal axes, and such reversal of the pattern is not necessary in the Woody device since the Woody device operates symmetrically in all radial directions.

Thus, the modification of Shaver to incorporate opposed tool and stylus from Woody would require the conception of a method of use of the apparatus which would not be obvious to a man skilled in the art. If a man skilled in the art did not conceive of applicants' method of using a reverse print, he would have to conceive of some other unobvious modification of Shaver, such as making the table 14 and map 10 transparent, in order to permit the Woody structure to be used in the Shaver apparatus." (Def's Exhibit 2, page 61-63).

It is clear that Plaintiff intended the Patent Office to believe that the phrase "reverse print" was important; and that in using a reverse print (an idea suggested by Elliott Dorsey Green, see page 3, supra) Plaintiff was doing something extraordinary. It is equally clear that Plaintiff is now taking (and took in the court below) a contrary position, namely that these words are

surplusage and should be ignored. In the Patent Office Plaintiff represented that if one did not use Plaintiff's reverse print "he would have to conceive of some other unobvious modification of Shaver, such as making table 14 and map 10 transparent....". That is to say, in the Patent Office Plaintiff represented that a structure such as Defendants' light table and a right reading print made transparent by the light table would be another and unobvious mode of operation.

The pertinence of this issue is that Defendants do not use a reverse print. Instead, as set forth in Plaintiff's Brief at pages 13-16, Defendants employ a transparent table with lights beneath it and they use a right reading map placed face down on the table. This structure was developed for sound technological reasons. See testimony of Nusbaum at RT 683-687. Among advantages of a light table and a right reading map is that topographical maps supplied by customers (which may be large in size) are often right reading maps, i.e., they are not reverse prints. The ability to use right reading prints avoids the delay and expense of obtaining reverse prints. RT 686-687. Defendants have received a patent on this structure. Defs. Exhibit 8.

Judge Harris' opinion correctly applies the law to the facts. It quotes from Lockwood v. Lagendorf, 324 F2d 82, 88 CA9, 1963 as follows at CT 35:

A narrower phrase was substituted to convince the Patent Office that Plaintiff had something new, different and patentable. This narrower phrase, which appears in Claim 4 of the patent (and by reference, in Claim 5) is as follows, the added words being underscored:

"a generally horizontal table thereon adapted to support a reverse print of a topographical map representing the model which is to be made..."
Def's' Exhibit 2, page 28.

Judge Harris recognized that Plaintiff blew hot in the Patent Office and blows cold in court.

A case directly in point on the legal effect of the added phrase, "reverse print", is Top-Scor Products, Inc. v. The H. C. Fisher Company, 150 USPQ 429, 259 F.Supp. 775, D.C., N.D. Ohio, 1966. In that case claims to shortening were involved. Defendant denied infringement on the ground that Plaintiff's claims, properly read, required that the shortening be thermally stable, and that defendant's shortening was not thermally stable. The claims did not in haec verba recite the feature of thermal stability, but during prosecution of the patent application plaintiff's attorney emphasized that thermal stability was an important feature of the invention. In sustaining defendant's contention that the claims should be construed as limited to a shortening characterized by thermal stability, the court said:

"The history of this patent before the Patent Office does reflect some claim amendment, but the meaning of the precise language of the amended claims is not the principal issue. It is the general inventive concept of the claimed compositions which is the prime issue, and in that respect the file history is informative."

* * * * *

"In considering this patent and its history, no matter where one begins the path inevitably leads back to thermal stability of the new compositions as the basic foundation of plaintiff's patent."

The Issue of Equivalents - Claim 11

This issue is whether the rack and pinion mechanism which Defendants use to raise and lower their router bit is the equivalent of the screw-in mechanism of Figure 2 of the patent. This issue is the subject of Findings Nos. 11, 12 and 13, CT 42-43, which are reproduced below for convenience of reference.

"11. Claim 11 is directed to the adjustable router assembly itself, apart from the rest of the machine. This claim is limited in its wording to (a) an internally threaded sleeve, such as the sleeve 24 in Figure 2 of the patent and (b) an externally threaded motor which is threaded into the sleeve as shown at 28 in Figure 2, such being the means for effecting vertical adjustment by screwing the motor down into or up out of the sleeve.

12. Defendants' apparatus does not employ this construction. Instead, defendants' router assembly employs a rack and pinion and the motor is moved up and down by sliding it within an outer sleeve. It is not moved by screwing it down into or up out of the sleeve.

13. In view of the fact that the apparatus of Figure 2 was never built, tested or used by plaintiff, the rack and pinion construction of defendants' machine is not the equivalent of the screw-in type of construction of Figure 2 and of Claim 11 of the patent."

Finding No. 11 correctly describes Plaintiff's

Figure 2 router and Finding No. 12 correctly describes Defendants' router. Plaintiff's quarrel is with Finding No. 13, which says that "the apparatus of Figure 2 was never built, tested or used by plaintiff". The legal significance of this finding that the apparatus of Figure 2 was never built, etc. is that the Claim 11 is a "paper patent" and is therefore entitled only to a narrow construction. In addition to the cases cited in the trial court's opinion in support of this legal conclusion, there are also the following cases:

Lockwood v. Langendorf, 324 F2d 82, 88, CA9, 1963:

"Where, as in this case, no embodiments of the patent asserted by plaintiff have ever been produced for commercial use, that circumstance is one calling for a narrow rather than a liberal construction of its claims. See: *Thompson v. Westinghouse Elec. & Mfg. Co.*, 116 F.2d 422, 425, 48 USPQ 49, 51-52 (2d Cir.1940); *Glendenning v. Mack*, 159 F. Supp. 665, 668-669, 116 USPQ 249, 253 (D. Minn. 1958).

Taylor v. Ford Motor Co., 154 USPQ 349, 353, F. Supp. ,
D.C., N.D. Tenn., 1967.:

"The second principle concerns the construction to be given to the Taylor patent in view of the fact that it is a "paper patent", a term used in patent law to signify that the subject matter of the patent has never been manufactured, sold or distributed. Taylor never built the system which is the subject of his patent (deposition of Floyd B. Taylor, Vol. I, p. 80). He did make a "crude model" of only the lock, which he sent to Washington, and "I haven't seen it since," (deposition, Vol. I, p. 13). Although the validity of a patent is not affected by its non-use or lack of commercial success, *Tillotson Manufacturing Co. v. Textron, Inc., Homelite*, 337 F.2d 833, 837, 143 USPQ 268, 271 (6th Cir. 1964), the fact of non-use is a ground for giving the patent a strict or narrow construction. *Shearer v. Atlas Radio Co.*, 94 F.2d 304, 306, 37 USPQ 164, 166 (6th Cir. 1938). See also 69 C.J.S., "Patents," § 198, and cases cited therein. In view of its non-use, lack of commercial success, and doubtful utility, the Court is of the opinion that the Taylor patent must be narrowly construed."

It comes as a complete surprise to Defendants' counsel that on this appeal and for the first time Plaintiff urges the contrary; that in fact its Figure 2 router was embodied in some manner in a working structure. Plaintiff's position is stated as follows at page 37 of its Brief:

"The District Court below held that Claim 11 of the patent was entitled a 'most meager range of equivalents' because of the District Court's understanding that 'Plaintiff has never incorporated the principle of vertical adjustment of the router assembly in a working model'. See the last paragraph at CT 35. The District Court's factual basis for this holding was, however, inaccurate. While the fact was not stressed by either party at the trial, Plaintiff's second machine which is shown in the photograph facing Page 8 of this Brief includes a rack and pinion which provide a vertical adjustment in the router assembly. The machinist who made that machine so testified at EX. 28, Pp. 18-21, and both of the attorneys for the Defendants have examined that machine. Thus, the District Court was in error in the factual premise on which the 'most meager range of equivalents' was based."

This position was not urged below; it is contrary to evidence adduced and admissions made below; and it is irreconcilable with the fact that, although Defendants brought their own rack and pinion router, Defs. Exhibit 25, into court and demonstrated it, Plaintiff could not produce a router purporting to be that of Figure 2 of the patent.

The Pretrial Order at CT 26-27 reads as follows:

"s. The only trade secret which Plaintiff relies on in this action as appropriated by Defendants, relates to a form of apparatus for making topographical models in which the sole accurate, vertical adjustment is provided in the router assembly."

"t. This form of apparatus alleged to have been a trade secret of Plaintiff prior to issuance of the patent, and to have been appropriated by Defendants, is not used and never has been used by Plaintiff."

These are facts stipulated to and binding upon the parties, and they refer to Pl's Exhibit O and Figure 2 of the patent, which illustrate a router assembly that can be adjusted vertically. It was Plaintiff's contention that this was a trade secret until such time as the patent was granted, that Defendants had access to that secret as a result of their employment by Plaintiff, and that after leaving Plaintiff's employ and setting up their own business, Defendants appropriated this secret in the form of Def's Exhibit 25. CT 4 and Findings of Fact Nos. 15 to 30, CT 44-48. Judgment was rendered for Defendants, CT 53, and no appeal has been taken by Plaintiff.

It is therefore conclusive and a matter of res judicata that the "form of apparatus alleged to have been a trade secret of Plaintiff (i.e., the "form of apparatus" shown in Figure 2 of the patent).. is not and never has been used by Plaintiff."

Moreover, at RT 137 Johnston testified as follows:

"Q. Could you -- and by you I mean the plaintiff -- yourself, Virginia Green, and the employees, going back to 1960 when you first started cutting models of foam, up to the present time you have never accomplished this accurate vertical adjustment except through the support above for the foam; isn't that correct?

A. That is correct."

Moreover, the evidence upon which Plaintiff now relies is ambiguous testimony by deposition of Roger N. Busch concerning the "second machine" which was made by the Busches for Plaintiff in 1963. The second machine, like the first machine which was made in 1960, had jack screws, a chain, sprockets, etc. for height adjustment, and as truthfully stated by Johnston at the trial,

"...up to the present time you (Plaintiff) have never accomplished this accurate vertical adjustment except through the support above for the foam.." RT 137.

That is, even with the "second machine" the rack and pinion was never used for "accurate vertical adjustment". The purpose of the rack and pinion is correctly stated by Roger N. Busch as follows:

"Q. Well, we will come back to this. Now, could you explain briefly the difference between the first router carriage and the second router carriage?

A. Yes, the same general shape was the same. It was on a tripod. It was a little larger than the first, because the principal change was in the action of it. The first one was more or less stable, although I think it could be moved up and down, just by loosening a clamp, but it certainly wasn't any accurate method of raising and lowering, and they wanted to -- Architectural Models wanted to get some motion in that router stand, so they wouldn't have to move the big table up and down each time. So, we used a rack and pinion, which gave them about four inches of travel on the router itself, vertical travel."

Pl's Exhibit 28, pages 20-21.

That is to say, the rack and pinion of the router for the "second machine" was intended, and was used, only for rough adjustments; it was not used for "accurate vertical adjustment".

The trial court's finding of non-equivalence between Plaintiff's "paper" device of Figure 2 and Defendant's actual, working device, Def's Exhibit 25, receives further support as follows:

Nusbaum demonstrated Def's Exhibit 25 and its rack and pinion mechanism, and he testified that this mechanism is much more easily, efficiently and speedily operated than the screw-in adjustment mechanism of Plaintiff's "paper" device. Nusbaum testified as to the probable disadvantages of Plaintiff's screw-in device; that it would be slow in operation; that it would be inaccurate; and that it would tangle the electric cord. RT 704-711. No counter proofs were offered by Plaintiff. On the contrary, Johnston testified that its Figure 1-2 router would require many rotations to adjust height (RT 170-171); that to change from a decimal scale to an architect's scale would require two routers (RT 174-177); and that the electric cord would tangle. RT 423-424. Johnston admitted that from looking at the drawings of the patent she could not explain how to raise the router bit of Figure 2 by an increment of 1/16". RT 177-178.

Moreover, the trial court found that Claim 11, besides being a paper patent, is in a crowded field. CT 36. This finding is amply supported by prior patents; by the prior knowledge of the gentlemen from Pullman, of Elliott Dorsey Green and of the Busches and by the Skill brochure. There was ample testimony concerning these items of prior art and prior knowledge.

For example, Nusbaum testified that the Jacobson patent, Def's Exhibit 4, has a stylus and cutting tool and are coaxial (i.e., in line as in Plaintiff's device) and employs the equivalent of a reverse print (RT 717-722); and that German patent 15309, Def's Exhibit 7, likewise has a coaxial stylus and cutting tool, that the cutting tool can be adjusted, and that it uses a right reading print. RT 725-728, 742-747. When the inventive acts, if there were any, of Johnston and Green were performed, they had knowledge of the pantograph machine of the gentlemen from Pullman, of the ideas of Elliott Dorsey Green and of the ideas and contributions of the Busches (pages 2-4 , supra). They had constructive knowledge of the patents cited by the Patent Office such as Def's Exhibits 4-7. Walker on Patents, Deller's ed., page 293 (Sect.59). Moreover, the cutting tool employed by both parties is and always has been a modification of a commercially available tool, the Skil router manufactured by the Skil Corporation. That router is shown in Def's Exhibit 24, a Skil router instruction manual which is conceded by Plaintiff to be a description of the Skil router as it was in 1960 when Johnston and Green commenced their work on the machine of Figures 3 to 5 of the patent. RT 422-423. Virtually all that Plaintiff contemplated⁴ was to use a Skil router as shown at 28

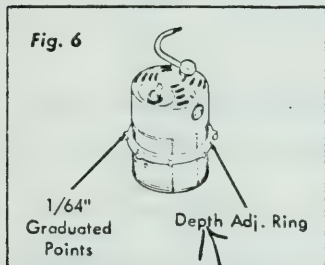
4. The word "contemplated" is used advisedly because Plaintiff never built its Figure 2 router.

in Figure 2 of the patent, to turn it upside down and to thread it into a sleeve 24 so that it could be screwed up and down, together with legs to support it. Page 6 of the Skill brochure, Def's Exhibit 24, is reproduced below and is worthy of comment.

6

Depth Adjustment

To regulate the depth of cut, raise or lower the motor housing, as follows:



1. Turn switch off.
2. Loosen the clamp knob.
3. Turn the adjusting ring until the base is setting flush and the bit is just touching the surface the base is setting on. (Turn the adjusting ring clockwise to raise the bit and counterclockwise to lower it.) At this setting you are exactly at "0" depth of cut.
4. The adjusting ring has 8 points, each of which indicates 1/64" change in depth. Therefore, one complete turn of the ring will change the depth of cut 1/8". Use the adjusting groove in the threads as a reference point.

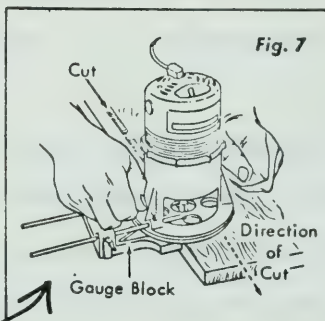
Adjust the desired depth.

5. When you get the proper depth setting, tighten the clamp knob and the bit will be locked in position.

Guiding the Router

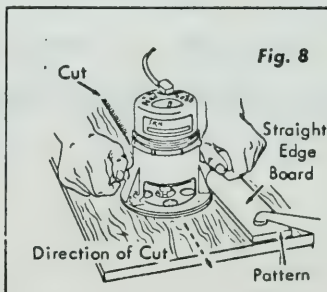
The SKIL Router consists mainly of two parts; the motor assembly and the base assembly. The two side handles on the base are positioned for best control and balance. Grasp the Router firmly when you turn on the switch to overcome the starting torque of the motor.

There are 5 basic methods of controlling the movement of the router.



1. By the use of Gauge Block, Fig. 7.

Locate gauge block the desired distance from cutter bit and guide Router by sliding gauge block along outer edge of work. Screws must be tight. Two holes are provided on face of gauge block for mounting a curved or straight piece of wood (8 to 10 inches long, about 1/2-inch wide and 1 inch thick) as a further aid in guiding the Router.



2. By use of Router Base, Fig. 8.

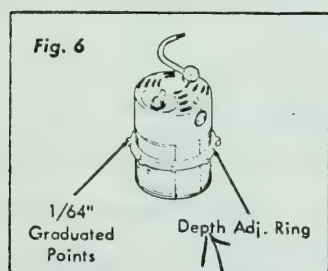
Clamp straight edge or curved board on work to be cut. It may be in the form of the desired pattern. Guide Router by allowing its base to follow desired pattern in the board.

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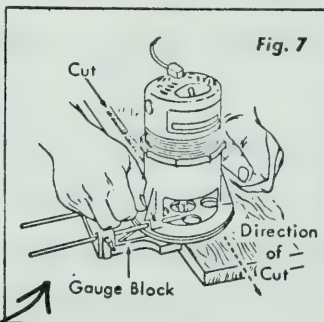
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Guiding the Router

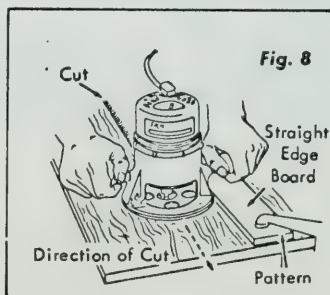
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2. By use of Router Base, Fig. 8.

Clamp straight edge or curved board on work to be cut. It may be in the form of the desired pattern. Guide Router by allowing its base to follow desired pattern in the board.

Note that to adjust the depth of cut made by a Skil router it is standard operating procedure to turn the depth adjusting ring until the cutting bit just touches the base (i.e., it makes no cut); then turn the adjusting ring bearing in mind that as it is turned one eighth of a complete turn (the distance between two "points") the bit is extended $1/64$ "; then when the desired adjustment has been made the clamp knob is tightened. Pertinent parts of page 6 of the brochure are marked.

Upon comparing page 6 of the Skil brochure with Figure 2 of the patent and with the instructions in the patent at column 2, lines 22-39, a striking similarity is evident. All that Plaintiff did was put feet on a Skil router and turn it upside down.

The Issue of Equivalents - Claim 14

The issue here is whether certain broad language in Claim 14 should, under the applicable statute, 35 USC 112, be interpreted in the same manner as certain more restricted language in Claim 11. This issue and its resolution are clearly and succinctly stated in the trial court's Finding No. 14, CT 43, 44, as follows:

"14. Claim 14 is broader in terminology than Claim 11 because, instead of reciting a threaded sleeve and a threaded motor, it recites "adjustable connecting means interconnecting said motor and said body for adjustably positioning said router," etc. However, viewed in the light of 35 U.S.C. 112, third paragraph, which reads as follows:

"An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material or acts described in the specification and equivalents thereof."

"Claim 14 must be limited to the Figure 2 structure and equivalents. Having found that the rack and pinion construction of defendants is not the equivalent of the threaded, screw-in type of structure of Figure 2, it follows that Claim 14 is no broader in scope than Claim 11 and that defendants do not employ the structure of Claim 14."

The rule of claim interpretation set forth in 35 USC 112 is a statutory command which cannot be ignored. This legal point is not dealt with in Plaintiff's Brief. Indeed, Plaintiff's Brief does not mention 35 USC 112. This statute says that a

means clause "shall be construed to cover the corresponding structure, material, or acts ---- described in the specification and equivalents thereof". Plaintiff does not in its Brief tell us how the court below, how this court, or how any other court could reconcile the statutory command of 35 USC 112 with an interpretation of Claim 14 which is broader than Claim 11. The only "means --- for performing" the function of height adjustment described in the patent is the screw-in mechanism of Figures 1 and 2, which therefore constitutes the only "corresponding structure". Therefore only this structure and its equivalents are comprehended by Claim 14.

Plaintiff's Brief, at page 43, seeks to bolster its case for a broader interpretation of Claim 14 by referring to a "rack and pinion structure---which was incorporated in the Plaintiff's second machine". This point is dealt with at length in this Brief, pages 26-30 , supra. All that need be added here is to note the following: The rack and pinion of the "second machine" are not shown in the patent. The statute, 35 USC 112, says that a "means" clause

"shall be construed to cover the corresponding structure --- described in the specification and equivalents thereof"

The rack and pinion mechanism of Plaintiff's second machine are not "described in the specification" of the patent.

In correctly applying the statute to Claim 14, the trial court also had the benefit of ample evidence including a demonstration and testimony of witnesses with regard to the different operating characteristics of the structure Figures 1 and 2 and of Defendant's structure, Def's Exhibit 25. See pages 31-32 of this Brief.

Moreover Plaintiff's Brief omits another interesting point. Assuming, arguendo, that Claim 14 does in fact express a broader concept than Claim 11, that is to say, that it is broader than a screw-in device as shown in Figures 1 and 2 of the patent and includes Defendants' rack and pinion device, nevertheless Claim 14 was not presented (i.e., this broader concept was not asserted) until after Plaintiff had seen Defendants' device on or about August 5, 1963. Def's Exhibit 2, pages 45-47. After seeing one of Defendants' topographical models, Plaintiff demanded entry to Defendants' plant and an inspection of Defendants' machine. This demand was complied with and Plaintiff, in the person of Leila Johnston, entered the plant and inspected Defendants' machine including their rack and

pinion router. RT 611-612. It was only after this, on September 12, 1963, that Plaintiff amended its patent application to present Claim 14. Def's Exhibit 2, pages 28-29.

Obviously, if Claim 14 expresses a broader concept, that concept (like so many other concepts in the patent) came from someone else, in this instance from the Defendants.

Summary Regarding the Issue of Equivalents

The issue of equivalents is dealt with in Plaintiff's Brief at pages 32 to 40 with regard to Claim 11 and at pages 40 to 43 with regard to Claim 14. A careful reading of these pages fails to reveal any reference to factual evidence adduced at the trial, with only a single, irrelevant exception. That exception is at page 37, last line and page 38 where Plaintiff refers to testimony that Defendants' rack and pinion are intended for vertical adjustment and that a rack and pinion are old. Plaintiff merely disagrees with the trial court and asks this court to disagree. But a finding of non-equivalence - that structure A does not do the same thing in the same way to accomplish the same result as structure B - is a finding of fact and if there is substantial evidence supporting it, the finding should not

be set aside. In this case, apart from legal argument and citation of the Encyclopedia Britannica, all of the evidence supports the finding of non-equivalence. Such evidence comprises proof that the patent is a paper patent, evidence that there is close prior art including prior art that was not considered by the Patent Office, testimony that the Figure 2 device would operate inefficiently, a demonstration and testimony that Defendants' device operates efficiently and an admission by Plaintiff of ignorance regarding operation of the Figure 2 device.

CONCLUSION

This court is confronted with an appeal by a patentee whose patent was litigated adversely before a judge who has had many years of experience in the trial of patent cases. An odd circumstance is that the patent describes and claims a machine (that of Figures 3-5) which was actually built and used and a machine (that of Figures 1 and 2) which was never built and never used, but the patentee is suing on Claims limited to the machine that was never built or used. Another odd circumstance is that the "paper" device which is sued on is claimed to be the "preferred" form of the invention although it was never built or

used. Yet another odd circumstance is that the patentee assembled in its patent a number of ideas contributed by other persons. And Plaintiff would have this court believe that its Claim 14 embodies a broad concept derived in part from Defendants' ingenuity.

On this record, the trial court was quite indulgent toward Plaintiff in that it left Plaintiff with a presumptively valid patent which, without question, covers the machine that Plaintiff actually built and uses.

What the Plaintiff asks of this court is that it stretch Plaintiff's patent to cover something that Plaintiff never saw fit to build and something which Defendants (not the Plaintiff) took the trouble and spent the money to build.

Certainly, in the light of the reasoning of the Supreme Court in Graham v. John Deere, 86 S.Ct. 684, 383 US 1, and United States v. Adams, 86 S.Ct. 708, 383 US 39, this patent, if sustained at all, is entitled only to a very narrow interpretation. In actual fact the patent in its entirety, and most certainly the "paper" Claims 4, 5, 11 and 14, deserve to be held invalid.

In Graham, at 86 S.Ct. 694, 383 U.S. 17, 18, the Supreme Court discussed criteria of patentable invention as follows:

"Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevance. See Note, Subtests of Nonobviousness, 112 U.pa.L. Rev. 1169 (1964)."

In the present case, there is a complete absence of "such secondary considerations as commercial success, long felt but unsolved needs, (or) failure of others" because the device sued on was never built and the patent never served to guide anyone in the building of a machine. This case presents a bold attempt to use a patent on a machine that was actually built and operated (the Figures 3-5 machine) as a springboard to fence in something that the Plaintiff never bothered to build and wishes to prevent others from building. Valid patents which are entitled to a liberal interpretation are not made of such stuff. In Adams it was shown that there had been a severe problem, that others attempted but failed to solve the problem, and that the patentee's device solved the problem and was copied by others. That is the antithesis of the situation here.

The trial court's narrow interpretation of Claims 4, 5, 11 and 14 of U.S. Patent No. 3,127,209 was correct and should be affirmed.

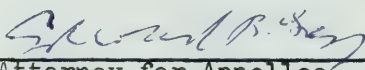
Dated: San Francisco, California

November 30, 1967

Respectfully submitted,

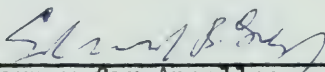
GREGG & STIDHAM

Edward B. Gregg, Esquire

By 
Attorney for Appellee

CERTIFICATE OF COUNSEL

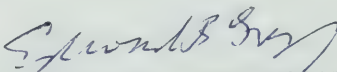
I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those Rules.



Attorney for Appellee

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I have delivered three copies of the foregoing Brief to NAYLOR & NEAL, 1650 Russ Building, San Francisco, California, this 30th day of November, 1967.



Attorney for Appellee

ARCHITECTURAL MODELS, INC.,
a California corporation,

Appellant,

v.

NILS C. NEKLASON and
DONALD NUSBAUM doing business
as SCALE MODELS UNLIMITED,

Appellees.

APPELLANT'S REPLY BRIEF

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FILED

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WM. B. LUCK, CLERK

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Defendants devote extensive sections of their brief to an attack on the validity of Plaintiff's patent based on prior art and inventorship. These issues are not involved in the appeal because the District Court's judgment was based on non-infringement only. Defendants apparently hope to obtain some help on the non-infringement issue by arguing validity issues, but full analysis of validity shows that Defendants infringe the patent deliberately to obtain the Plaintiff's improvements over the prior art.

The Prior Art

Defendants have attempted to enumerate all of the parts of Plaintiff's invention which are old in the prior art (Appellee's Brief, Pp. 2-7). What the Defendants have not done is comment on the two basic features of the invention which are new. Plaintiff's invention, as defined in the four patent claims in suit, was the first model making machine which (1) eliminated all support linkages between the cutting tool, stylus, and machine frame, and (2) consolidated the vertical adjustment into a small, compact router assembly.

Defendant Nusbaum described the prior art which the Defendants relied on in challenging the validity of the patent. He then admitted on cross-examination (TR. 756-768) that every one of those prior art structures had a movable support linkage for the cutter and stylus where the linkage was at least as long as one-half of the width of the model being cut. He colored these long linkages in green ink on Exhibits 3A, 3B, 4, 5, and 7.

The elimination of these movable linkages is very important to the machine of Plaintiff's invention. It was the principal reason why Plaintiff changed its machine in the first place. A machine is cumbersome to operate where the operator has to move a large mass of tool and support structure as he follows intricate lines on a topographical map. Plaintiff had known that the models could be made with a pantograph, but it rejected the use of a pantograph because a pantograph includes a large movable support linkage. (TR. 239-243)

The Defendants are paying tribute to the importance of this improvement by fighting so hard in challenging the validity of the patent. The Defendants have a second model making machine. The second machine can make the same models that the Defendants make on the infringing machine. Use of the second machine would not infringe the patent. Yet, Defendants are not content to avoid infringement by using their second



machine because the second machine is a pantograph. (CT. 25, paragraph n)

Thus, Plaintiff designed the machine of its invention to eliminate the pantograph linkage arms, and Defendants have found that elimination of the pantograph linkage is important enough to justify expensive litigation. This is not the first time that Plaintiff has stressed the importance of eliminating support linkage in the machine. Plaintiff stressed this feature to the Patent Office in the brief which was filed just before its patent application was allowed.

"It will be noted that there are several unique and interrelated features of this apparatus which make the apparatus both quite inexpensive to build and very efficient to operate even in the making of very large topographical models. Thus, the portion of the apparatus which is moved to guide the cutting tool around each topographical line is a single unitary assembly as shown in Fig. 4 which does not require any moving parts for guiding and supporting the cutting tool during its travel around the topographical line; the sole support from and relative movement with respect to the frame of the machine occurs at the support feet on the tool carrier where the tool carrier slides across the topographical map, and this manner of support permits the apparatus to be operated very efficiently on very large models while eliminating the necessity of strong and costly mechanisms for supporting and guiding the stylus and cutting tool around the frame of the apparatus. Applicants are able to employ such a simple compact stylus and cutting assembly because of the unique and novel arrangement they employ where the work 20 is supported upside-down above the topographical map; this support arrangement for the map and work permits the

tool carrier to employ the map supporting surface as its own support and guidance surface where other devices which have been made for this purpose have required independent support means for mounting the router on the frame members independently of both the map table and the work holding means. It will be noted in this regard that four features of the apparatus cooperate together to permit support of the tool and stylus on the table 12 solely by gravity, namely: (1) the mounting of opposed tool and stylus on a single unitary tool carrier which has downwardly facing feet; (2) the mounting of the table 12 and work 20 facing toward each other with the tool carrier between them; (3) the arrangement of the table 12 and work 20 in this manner where the work 20 is above the table, and (4) the mounting of the tool carrier on the frame resting on the table for free sliding movement over the table. The elimination of any one of these four features from the apparatus would destroy the ability of the apparatus to be made and function as described above." (Ex. 2, Pp. 56 - 58 with emphasis added)

This statement to the Patent Office is also material because it points out four structural features of Plaintiff's invention which are necessary to obtain elimination of the pantograph linkage: (1) unitary tool carrier, (2) table and work facing each other, (3) work above the table, and (4) tool carrier supported on table. None of the references cited by the Patent Office showed all of these features, and none of the references cited by Defendants show all of these features. Defendants' infringing machine does include all of these features and Defendants' machine thereby avoids use of the pantograph linkage.

There is another important aspect to this statement to the Patent Office. In it Plaintiff listed four essential features of the invention, but it didn't say anything about a "reverse print". The invention was a machine in which the four features were essential. Feature number 2 creates the mirror image problem because it requires that the table and work face toward each other so that the operator of the machine must see a mirror image of the model he makes. But since a mirror image map was merely something to be used with the invention (the machine was the invention), the mirror image map was not recited as an essential feature of the invention. The Defendants' machine includes all of the essential features of the machine of the invention, and hence the Defendants are using the invention regardless of the name they give to the piece of paper they put on the table.

Vertical Adjustment of The Router Assembly

The four claims involved in this suit relate to what the patent calls the "preferred form" of Plaintiff's invention where the accurate vertical adjustment is built into the compact router assembly instead of the main frame of the machine. Neither the prior art nor Plaintiff's first machine had this vertical adjustment in the router assembly. Plaintiff has always contended that this feature amounted to an invention in

and of itself regardless of what mechanism was used for the vertical adjustment.

At one time, the Defendants agreed. Defendants' counsel described this feature as the Defendants' "invention" before the Defendants knew that the Plaintiff had made the invention first (Ex. N). When Defendant Neklason testified about the time Defendants "invented" the rack and pinion, he described his state of mind as follows:

"Q. These two concepts you felt were new?

"A. Yes, sir.

"Q. Did you feel that the rack and pinion adjustment was new because of the fact that it was a rack and pinion or because of the fact that it provided the vertical adjustment of the machine in the router assembly?

"A. We felt it was new because it provided the vertical adjustment in the machine. The rack and pinion idea itself is an old idea.

"Q. And you felt that provision of the vertical adjustment in the router assembly was your idea?

"A. Yes, sir.

"Q. Do you think that is an important idea?

"A. I feel it is, yes.

"Q. Does it afford a substantial economic saving in the building of the machine?

"A. Very much so, yes.

"Q. Well, saving over what, over building it with a chain drive lift mechanism as in the machine Architectural Models employed?

"A. Substantial savings, yes.

"Q. Do you believe it is more efficient to use?

"A. Yes, sir.

- "Q. When did that concept of providing the motion in the router assembly occur to you? When did you first think of it?
- "A. It was sometime after Don and I had opened our business, and we felt that a contour machine, a topographic cutting machine, was going to be an asset for the business.
- "Q. This was more than two years after you had started using the topographical cutting machine at Architectural Models?
- "A. I believe so, yes.
- "Q. You had never thought of it before you left Architectural Models' employ?
- "A. To the best of my knowledge, no, sir.
- "Q. Were you satisfied academically with coming up with this concept? Did this seem to be important to you and --
- "A. We thought it was a good machine.
- "Q. Did you immediately recognize the concept of providing vertical adjustment in the router assembly as being a step forward in the art?
- "A. We may have.
- "Q. And this was one of the primary features of the machine which you and Mr. Nusbaum discussed which you thought you should see patent counsel about?
- "A. Yes, sir.
- "Q. When you were discussing the provision of a machine for cutting contours out of foam, did it seem to you that the provision of the vertical motion in the router assembly was the obvious thing to do?
- "A. I am sorry. The vertical position --
- "Q. The provision --
- "A. Oh.
- "Q. --of the vertical motion in the router assembly

was the obvious thing to do, or did you have some pride in the fact that you thought of providing that?

"A. I think we had some pride in coming up with our own design for our machine.

"Q. A particular pride in providing the vertical motion in the router assembly instead of in the legs of the table or in the overhead frame?

"A. Yes." (RT. 626 - 629)

This is the classic situation where an infringer lauded an invention until he discovered that he was the second inventor. Then he does an about face and argues that the invention is not patentable.

The Defendants' machine which is involved in this suit uses the vertical adjustment in the router assembly and the elimination of pantograph linkage arms, both features which Plaintiff invented.

Inventorship

During their listing of the things Plaintiff did not invent, Defendants refer to certain features of the invention which were suggested to one of Plaintiff's inventors by her father. Mr. Green suggested to Virginia Green that she could make her machine work if she mounted the plastic foam upside-down and used a reverse print of a topographical map. (TR. 451 - 454).

These facts are agreed upon. However, these facts do not put Mr. Green's suggestions in the prior art. These

facts merely raise this question: Were Mr. Green's suggestions so important that he should have been named as a joint inventor in the patent? It was the Defendants position below that the patent was invalid for faulty inventorship, not that Mr. Green's suggestions were prior art. Plaintiff contended that Mr. Green was not a joint inventor because he abandoned any claim to inventorship and did not claim to be an inventor when the patent application of Miss Green and Mrs. Johnston was shown to him (TR. 463 - 465). See Pointer v. Six Wheel Corp., 177 F.2d 153 (9th Cir., 1949).

This question may be debatable, and the District Court might have found that Mr. Green's suggestions were so important that he was a joint inventor. However, that finding would not influence the validity or scope of the patent because of the provisions of 35 USC §256 which are set forth in Appendix A.

No evidence whatsoever was presented that there was any deceptive intent in omitting Mr. Green as a joint inventor. Mr. Green had no invention agreement with anyone else (CT. 30). The Defendants claim no title interest in the invention from Mr. Green, and Plaintiff has an assignment from Mr. Green's heirs of any interest he may have had in the invention (CT. 28). Under these circumstances, faulty inventorship, even if Mr. Green was a joint inventor, could be corrected under the last paragraph of 35 USC §256 and would not absolve the Defendants of liability for infringement.

Defendants argue at page 18 that Plaintiff took the position with the Patent Office that the invention "embodied something new, namely, the use of a 'reverse print'," which the Plaintiff had invented. This is not true. The Dubosclard patent (Ex. 1) cited by the Patent Examiner showed the work and template facing toward each other so that a reverse print template was required. (Ex. 2, page 29 and Pp 34-35)

Plaintiff did not invent the reverse print, and it did not rely on the reverse print to distinguish the invention from the prior art. The invention is the machine. What Plaintiff relied on in distinguishing over the prior art is the list of four structural features of the machine quoted on page 4 above which, when used together, permit elimination of the pantograph linkage arms.

Defendants have eliminated the pantograph linkage arms from their machine by using all four of the features on which Plaintiff relied. These four structural features create the same reverse print problem in Defendants' machine as in Plaintiff's machines, and the operator of Defendants' machine must see a reverse print. Defendants' table is "adapted to support a reverse print" in the language of the claim. The name by which Defendants call their map, looking at the map from underneath the machine instead of from the operator's position, is a distinction in words not substance, if it is a distinction at all.

The cases cited by Defendants in support of their file wrapper estoppel argument are not in point here.

Lockwood v. Langendorf, 324 F.2d 82 (9th Cir., 1963) related to a much different situation. A structural feature of the invention, the bottom of the upper tray being inside the top of the lower tray, was missing from the accused device. It had been necessary to recite that structural feature in the patent claims to distinguish from the prior art. In the present case, the reverse print is not a structural feature of the invention; instead it is a feature which relates to the manner of use of the machine. There is a structural feature of the invention which creates the need for a reverse print, that is the table and work facing toward each other. This structural feature is recited in the claims, and Defendants' machine has this structural feature.

The doctrine of file wrapper estoppel does not apply in every case where a claim has been amended. As this court explained in International Mfg. Co. v. Landon, Inc., 336 F.2d 723, 142 USPQ 421 at 424 (9th Cir., 1964):

"Predicated on these transactions, which we have set out in barest outline, Jacuzzi Bros. argues that the purpose of the cancellation of claims 5 and 8 through 10, and the assertion of the four eventually-allowed claims was to define the filter element assembly in specific details in a manner which excluded sock-type filter elements. Accordingly, the company contends, Landon may not now expand his claim to include a type of filter element which was purposefully excluded from the Pace claims.

"It must be assumed that the redefinition of the filter element, as contained in the added claims which were incorporated in Pace, was purposeful. But this alone would not give rise to file wrapper estoppel so as to preclude patent coverage, on the theory of equivalency, of kinds of filter elements included in the first definition but not in the second. It must also appear that the redefinition was necessary to obtain the patent."

In the present case, the reverse print was old, and the Patent Examiner did not allow the claims when they were amended to mention a reverse print. Instead, the Examiner rejected the claims again on substantially the same grounds thereby indicating that he did not consider the reference to a reverse print necessary to obtain the patent. The Examiner allowed the claims only after it was pointed out in a later brief that the claims recited the four structural elements listed above where none of the references had those four elements. Defendants' machine has all four of those elements.

THE PAPER PATENT ARGUMENT

The paper patent argument is found in many reported cases, but in every case it is a "make weight" argument. It is the reverse of the "commercial success" argument which patent plaintiffs urge to sustain their patents. Patent defendants say that there has been no commercial success and hence the patent is a paper patent entitled to little consideration. As the Court said in Reinharts, Inc., v. Caterpillar Tractor Co., 85

"Furthermore, appellant's proposition -- that these patents, if not in practical use at the time of the trial, must be strictly limited to the structure specifically disclosed in their specifications and drawings--cannot be sustained. The authorities cited by appellant⁸ do not lay down any such rule. They merely hold that long-continued non-use of a patented invention may have a bearing on the construction to be given the patent, and that the courts, in construing such a patent, are not disposed to give it a broader scope than is clearly required. They do not hold that such a patent must be strictly limited to the specific structure disclosed in its specifications and drawings. Much less do they hold that a patent must be so limited, merely because of non-use at the time of the trial. A patented invention, whether used or unused, is measured, not by the specifications and drawings, but by the claims of the patent. See authorities heretofore cited."

The paper patent argument is weak to start with. In the present case, we don't even have a paper patent. The patent shows two machines in Fig.1 and Fig. 3. The machine of Fig. 1 has not been built, but Plaintiff has built two machines like the machine of Fig. 3. One of the machines is shown in Ex. HH and is substantially identical to Fig. 3. The other machine is shown in Ex. II reproduced in Appellant's Opening Brief.

Thus, we are not confronted with a paper patent. We have a patent which is one-half paper and one-half commercial success. It is submitted that the paper patent argument diminishes to the vanishing point.

The interesting thing about this argument is the analysis of where it leads us in patent cases generally. De-

fendants admit after much dispute that Plaintiff's second machine had a rack and pinion vertical adjustment in the router assembly.

"That is to say, the rack and pinion of the router for the 'second machine' was intended, and was used only for rough adjustments; it was not used for 'accurate vertical adjustment'." (Appellee's Brief, Page 30).

What Plaintiff built was not the exact vertical adjustment shown in Fig. 1, a screw arrangement, but it was a vertical adjustment nevertheless. Defendants say that the patent is a paper patent as far as vertical adjustments in the router assembly are concerned because Plaintiff didn't build the one shown in the patent, though they built a different one. This argument ignores the realities of life because many patent owners who achieve great commercial success do so by manufacturing forms of their inventions which do not in all respects conform to the devices shown in their patents.

Where the inventor's machine has been constructed before the patent is written, parts of the machine are often omitted or changed in the patent drawings to eliminate immaterial features and simplify the job of illustration and description. Where the inventor's machine has not been constructed before the patent is written, the machine is often improved before it is made so that the machine which eventually achieves commercial success is slightly different from the patent drawings.

The Defendants' argument would penalize both classes of these inventors because the Defendants would say that their patents are paper patents showing devices which had never been built.

The irony of the situation is pathetic when the difference between what is made versus what is shown in the patent is the difference between a rack and pinion and a screw. It is difficult to imagine two more classic equivalents than the screw and the rack and pinion. Both devices are centuries old, so old that the identity of their inventors is lost in antiquity. Both devices are used interchangeably. The encyclopedia, cited in Appellant's Opening Brief, shows that both are used as simple jacks. Plaintiff considered using both of them before the patent application was filed. Adjudicated cases are rare on the equivalency of any two specific items, but a rack and pinion has been held to be the equivalent of a frictional drive in Dear Rubber Mfg. Co. v. Killian, 106 F.2d 316, 42 USPQ 493 (8th Cir., 1939).

" a rack and pinion gear drive is a well-known substitute for a friction drive even in the most narrow range of equivalents."
(At. 42 USPQ 496)

DEFENDANTS' 35 USC §112 ARGUMENT ON EQUIVALENTS

Defendants place great emphasis on the last paragraph of §112 in arguing that the means clause of Claim 14 should be limited to the scope of Claim 11.

In the first place, it should be noted that Defendants are attempting to use the paper patent limitation of Claim 11 as a limitation on Claim 14. Plaintiff may not have built the screw mechanism of Claim 11, leaving Claim 11 as a "paper patent" to be narrowly construed. But Plaintiff has built the structure defined by Claim 14. It is illogical to say that the narrow range of equivalents of Claim 11 which is based on the paper patent status of that claim applies to Claim 14 which is not a paper patent under any argument.

Defendants argued extensively (Appellees' Brief Pp 26-29) before admitting that Plaintiff had built a vertical adjustment in the router assembly. There is no stipulation or res judicata to the contrary. The trade secret which Defendants did not learn from Plaintiff was the concept of making the sole, only, accurate vertical adjustment in the router assembly. Plaintiff's second machine which has the rack and pinion did not use this trade secret because it also had an accurate vertical adjustment in the main frame. (Ex. II).

Coming back to the §112 problem, this argument is not new. It was advanced, to no avail, by the present Defendants' counsel in Atlas Pacific Engineering Co. v. George Ashlock Co., 339 F.2d 288, 144 USPQ 55 (9th Cir., 1964). The argument fails because §112 does not apply to every means clause in a claim. Some history is necessary here.

Patent claims must define an invention structurally, not merely in terms of the overall function or result which an

invention is intended to accomplish except where §112 specifically permits functional language, Broad claims which define a structure as "means" for accomplishing a result have been attacked as invalid for functionality. The original classic case on the subject is the Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U.S. 405 (1908). There the court held that the means clause in a claim was not functional because it recited structural features in support of the means by which the result was accomplished. In a later case, Halliburton Oil Well Cementing Co. v. Walker, 329 U.S. 1 (1946), the court held that the means clause was functional and the patent invalid because the means clause did not recite any structural relation in support of the means for accomplishing the result. Section 112 of the Statute was passed to overrule the Halliburton Case. See: Commentary On the New Patent Act, Federico, United States Code Annotated, West. Pub. Co., Title 35, Vol. 1, Page 1, 25. The last paragraph of §112 reads as follows:

"An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof." (66 Stat. 798, 1952, emphasis added).

The Statute overrules Halliburton by permitting a means clause which will be limited to the means shown and equivalents. Note, however, that the Statute by its express terms applies only to the Halliburton type means clause where no structure in sup-

port of the means is recited in the claim. The Statute does not apply to the Paper Bag type of means clause where structural features in support of the means are recited.

The "means" clause in the Paper Bag case read, "operating means for the forming plate adapted to cause the said plate to oscillate about its rear edge upon the surface of the cylinder during the rotary movement of said cylinder," 210 U.S. at 417, and the Supreme Court said, "The claim is not for a function, but for a mechanical means to bring into working relation the folding plate and the cylinder." (210 U.S. at 422).

Claim 14 is not for a function (vertical adjustment) but for a mechanical means to bring into working relation the router and the body. The means clause of Claim 14 reads, "adjustable connecting means interconnecting said router and said body for adjustably positioning. . . ." The "means" has a connection to the router and a connection to the body which are structural features supporting the function "for adjustably positioning". The means clause in the Paper Bag case was held to be infringed by a different structure than that shown in the patent even though the patent was a paper patent. The same result should follow in this case.

The means of Claim 14 is not limited to the means of Claim 11. Why have two different claims if they mean the same thing? As the Supreme Court said in Smith v. Snow, 294 U.S. 1, 14 (1935), "Thus, by striking an obviously intended contrast with other claims, Claim 1 covers broadly. . . ."

"Whenever a patent is issued on the application of persons as joint inventors and it appears that one of such persons was not in fact a joint inventor, and that he was included as a joint inventor by error and without any deceptive intention, the Commissioner may, on application of all the parties and assignees, with proof of the facts and such other requirements as may be imposed, issue a certificate deleting the name of the erroneously joined person from the patent.

"Whenever a patent is issued and it appears that a person was a joint inventor, but was omitted by error and without deceptive intention on his part, the Commissioner may, on application of all the parties and assignees, with proof of the facts and such other requirements as may be imposed, issue a certificate adding his name to the patent as a joint inventor.

"The misjoinder or nonjoinder of joint inventors shall not invalidate a patent, if such error can be corrected as provided in this section. The court before which such matter is called in question may order correction of the patent on notice and hearing of all parties concerned and the Commissioner shall issue a certificate accordingly." (35 USC §256)

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those Rules.

Karl A. Limbach
Attorney for Appellant

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I have mailed three copies of the foregoing Brief to Harvey G. Lowhurst, 2500 El Camino Real, Palo Alto, California, this 20th day of December, 1967.

Karl A. Limbach
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS SWEENEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUL 1 1968

FILED

JUN 27 1968

WM. B. LUCK, CLERK

APPELLEE'S BRIEF

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FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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APPELLEE'S BRIEF

I

STATEMENT OF PLEADINGS AND FACTS
DISCLOSING BASIS OF JURISDICTION

An indictment in two counts charging appellant (hereinafter sometimes referred to as defendant) with receiving, concealing and facilitating the transportation and concealment of marijuana was returned by the Federal Grand Jury, and filed in the District Court on November 2, 1966 (Clerk's Transcript [hereinafter abbreviated C. T.], p. 2). Both counts of the indictment charged a violation of 21 U. S. C. 176(a), Count One charging the receipt, concealment, and facilitation of receipt and concealment of approximately 27,953 grams of marijuana, and Count Two

charging the same illegal acts as to 1,309 grams thereof. The indictment charged that the violations in question were committed on or about September 14, 1966, by the defendant Thomas Sweeney (a/k/a Thomas Hodges).

After a jury trial which commenced on December 20, 1966, before the Honorable Jesse W. Curtis, United States District Judge, a verdict was returned. on December 23, 1966, finding the defendant guilty as charged on both counts (C. T. p. 28).

On January 23, 1967, the defendant was sentenced to five years in the custody of the Attorney General on each count of the Indictment, the sentences to run concurrently (C. T. p. 33).

On February 2, 1967, the appellant mailed a letter to Judge Curtis, which by order of the District Court, was filed as a notice of appeal (C. T. p. 32). By Order filed February 15, 1967, in the United States District Court (C. T. p. 34), Judge Curtis denied appellant leave to proceed in forma pauperis, upon the ground that the appeal was frivolous, and not taken in good faith. By Order filed May 17, 1967, in this Court, appellant was granted leave to proceed in forma pauperis.

Jurisdiction of the instant matter rests upon 28 U. S. C. 1291.

II

STATUTES AND RULES INVOLVED.

A. 21 U. S. C. 176(a) provides, in pertinent part, as follows:

"Notwithstanding any other provision of law, whoever knowingly, with intent to defraud the United States, imports or brings into the United States marijuana contrary to law, or smuggles or clandestinely introduces into the United States marijuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marijuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000.00 . . . "

B. Amendment Six to the United States Constitution provides, in pertinent part, as follows:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, . . . and to be informed of the nature and cause of the accusation; . . . "

C. Rule 10, Federal Rules of Criminal Procedure, provides as follows:

"Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead."

D. Rule 43, Federal Rules of Criminal Procedure, provides in pertinent part, as follows:

"The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict . . . In prosecutions for offenses punishable by fine or imprisonment for not more than one year or both, the Court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. . . ."

E. Rule 52, Federal Rules of Criminal Procedure, provides:

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court. "

III

STATEMENT OF THE CASE

A. Questions Presented.

1. Whether the appellant was apprised of his constitutional rights as set forth in Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974 (1966).

2. Whether appellant voluntarily, knowingly and intelligently waived effectuation of those rights.

3. Whether, assuming strictly arguendo that the warnings given to appellant did not comport with the requirements of the Miranda decision, supra, and there was no voluntary, knowing and intelligent waiver by appellant of effectuation of his constitutional rights, the introduction in evidence of the statements and admissions by appellant constituted harmless error.

4. Whether the arraignment procedure employed

herein deprived appellant of any rights provided by the Federal Constitution or by the Federal Rules of Criminal Procedure.

5. Whether, assuming strictly arguendo such a deprivation of rights, it nevertheless constitutes harmless error.

B. Statement Of Facts.

1. Re Admission of Incriminating Statements.

As is reflected in the Reporter's Transcript of the trial proceedings herein (hereinafter abbreviated R. T.), the agents of the Federal Bureau of Narcotics who participated in the apprehension of appellant expressly and promptly gave him admonitions concerning his constitutional rights. Thus, it was testified by Agent Saiz, R. T. 72:

"At this time Agent Lipschutz, myself, and Agent Heath approached [appellant], and Agent Lipschutz placed him under arrest.

"As he placed him under arrest we then asked him to accompany us to the security office of the airlines terminal.

"I then picked up the two suitcases that Mr. Sweeney had taken out of the car and we went into the security office.

"At the security office Agent Lipschutz, myself

and Agent Heath again identified ourselves, showed Mr. Sweeney identification, and again Agent Lipschutz advised him at least once and possibly two or three times that he did not have to make any statements, any statements that he made could be used in a court of law against him; that he need not make any statements, and that he was entitled to an attorney if he could not afford one, that one would be appointed for him; that he was entitled to use the telephone.

"He was asked if he was aware of his constitutional rights.

"Q. Do you recall Agent Lipschutz asking him any questions?

"A. After advising him of his rights, Agent Lipschutz asked him if the two suitcases were his.

"He stated that they were, that they were his property.

"Shortly thereafter Agent Lipschutz asked him -- I beg your pardon. He asked him what the contents of the suitcases was, and he replied --

* * *

"THE WITNESS: Mr. Sweeney advised or said something to the effect, "Well, you fellows know what is in there."

At R. T. 92, Agent Lipschutz related in essence how he apprised the appellant of his constitutional rights, saying:

"At this time I advised Mr. Sweeney, I said, 'Mr. Sweeney or Mr. Hodges, or whatever your name is, you are under arrest for violation of federal narcotic laws. I would like you to accompany me and not to do anything foolish. '

* * *

"Inside the security office I advised Mr. Sweeney of his constitutional rights, he had a right to remain silent, that anything he said or did could be used against him in a court of law, he had a right to have an attorney, and that if he did not have an attorney one would be appointed for him.

"I then asked him if he understood, and he said, 'Yes. '

"I then asked him, 'What are in the suitcases?'

"Mr. Sweeney made the statement, 'You guys know what is in there. ' "

Agent Lipschutz again gave essentially the same testimony pertaining to his apprising the appellant of his constitutional rights, as set forth at R. T. 120-121.

After the Government rested its case at the trial herein, the defendant took the stand and, not denying his possession of the respective quantities of marijuana which are the subject of the instant proceeding, asserted a claim of entrapment. According to appellant's own testimony, he first saw the marijuana on the morning of September 14th, the day of his arrest, at his apartment. Thus, he related, at R. T. 195:

"Well, Miss Gasson [appellant's "fiance"] came in first and proceeded back toward the bedroom [of the appellant's apartment]. Within a moment or two Dick [an alleged "friend" of appellant's who supposedly shared his apartment with appellant and Miss Gasson] came up and had the marijuana with him.

"Q. By 'marijuana' are you referring to the contents of the People's [sic] exhibits?

"A. Yes.

"Q. The prosecution exhibits over here today?

"A. Yes.

"Q. Prior to that time had you ever seen this stuff?

"A. No.

* * *

"Q. What happened then?

"A. Well, during the next 15 or 20 minutes it was packaged into two suitcases, all except the other exhibit that the prosecutor has.

"Q. The other exhibit?

"A. The small one that would not fit in the suitcase. It was suggested that I carry them in another manner. It had all been stuffed in two suitcases, if possible, which I definitely wouldn't agree to, because if they sprung open or were overweight or for some

reason or other it would present a hazard that shouldn't be there. So it was placed in the cupboard in the kitchen. [The "small" exhibit is the 1,309 grams of marijuana which is the subject of Count Two of the Indictment.]

* * *

"Q. Subsequently you went out to the airport?

"A. Yes.

"Q. At the time of your arrest did you have some conversation with Mr. Lipschutz and one or two other officers?

"A. Yes, sir.

"Q. Did they ask you anything?

"A. Many things.

"Q. In relating to the marijuana in particular, did you have any conversation with Mr. Lipschutz concerning the marijuana?

"A. Well, starting with the suitcases he asked me if I knew what was in them.

"I said, 'Yes, but, then, you already know.' I suppose I sounded a little bitter.

* * *

"Q. What [else] did you tell him?

"A. Well, they asked me if there was any more marijuana. I told them there was some in my

apartment.

"And he said, 'Well, would you cooperate with us and take us back there?'

"And I said, 'Yes, I would.' "

In other portions of his testimony, appellant related an alleged course of events by which he was purportedly entrapped into trafficking in marijuana (R. T. 183-227).

2. Re Purported Defects in Arraignment Procedure.

At the commencement of the proceedings in the trial Court, as set forth at R. T. 8 and 9, the following took place:

"THE CLERK: This is Case No. 36796.

"THE COURT: Will counsel approach the bench, please?

(Whereupon, the following proceedings were had at the bench out of the hearing of jury panel:)

"THE COURT: It appears that the defendant has not been arraigned on the superseding indictment which has been filed. Let's proceed with the arraignment.

"THE CLERK: There has been a superseding indictment brought in this matter accusing you of violating the laws of the United States, a copy of which has been handed to your counsel. Do you waive reading?

[Emphasis added.]

"MR. CUTLER: Waive reading of the Indictment.

"THE CLERK: Are you ready now to enter your plea to the superseding indictment? [Emphasis added.]

"MR. CUTLER: Yes.

"THE CLERK: How do you plead to Count 1 of the Indictment, guilty or not guilty?

"MR. CUTLER: Not guilty.

"THE CLERK: Count 2?

"MR. CUTLER: Not guilty.

"THE COURT: Very well.

"Do you stipulate we may proceed with trial at this time?

"MR. CUTLER: Yes. So stipulated.

"THE COURT: Waiving any further notice?

"MR. CUTLER: Yes.

"THE COURT: Very well. You may proceed to trial."

IV

SUMMARY OF ARGUMENT

A. The appellant was given the admonitions required by the decision of the United States Supreme Court in Miranda v.

Arizona, 384 U. S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974 (1966), and voluntarily, knowingly, and intelligently waived effectuation of his constitutional rights.

B. In light of appellant's own testimony, given by him under oath at the trial in an attempt to establish entrapment, he thereby established the fact of his knowing and intentional possession of the marijuana in question, hence rendering purely academic any dispute as to the effect of the admonitions uttered by the Federal Narcotics Agents. In these circumstances, any error of the Trial Court in admitting into evidence the testimony of the narcotics agents regarding appellant's admissions would be harmless error, within the meaning of Rule 52, Federal Rules of Criminal Procedure, and hence must be disregarded.

C. It may be inferred from the contents of the Reporter's Transcript of the proceedings below that appellant was at the bench when the arrignment procedure took place.

D. Appellant was not denied a public trial in open court by an arraignment at the bench. Hence there has been no violation of the Sixth Amendment to the Federal Constitution, nor of Rules 10 and 43, Federal Rules of Criminal Procedure.

E. The Reporter's Transcript shows that appellant's counsel was handed a copy of the Indictment (R. T. 8), in compliance with Rule 10, supra.

F. A failure to comply with arraignment requirements is a mere technical defect, not warranting a reversal unless an objection was raised when the irregularity took place.

Garland v. Washington, 232 U. S. 642, 34 S. Ct.
456, 58 L. Ed. 772 (1913).

G. In view of the fact that appellant's counsel was handed a copy of the indictment, waived reading thereof, entered pleas of not guilty as to both Counts thereof, and stipulated that trial could forthwith proceed, waiving any further notice, any irregularity in the arraignment proceeding would constitute mere harmless error, not justifying a reversal.

Rule 52, Federal Rules of Criminal Procedure.

V

ARGUMENT

I

THE WARNINGS GIVEN BY THE FEDERAL NARCOTICS AGENTS COMPLIED WITH THE REQUIREMENTS OF THE MIRANDA DECISION, AND PURSUANT THERETO, APPELLANT MADE A VOLUNTARY, KNOWING AND INTELLIGENT WAIVER OF EFFECTUATION OF HIS CONSTITUTIONAL RIGHTS.

As pointed out in the Statement of Facts hereinabove, at several points in the Reporter's Transcript, the narcotics agents testified that the appellant was given all of the required admonitions set forth in Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974 (1966). Agents Lipschutz and Saiz both testified that appellant was told that he had a right not to answer any questions and to remain

silent; that any statements made by him could be used against him in a court of law; that he was entitled to an attorney even if he could not afford one; and that he was entitled to use the telephone. (In fact, the right to use a telephone is not mentioned in Miranda, so it might be said that the warnings given went beyond the scope of the Miranda requirements.) Agent Lipschutz then asked appellant if he understood what was being said to him, and he answered in the affirmative.

In Miranda, the following law was laid down, in the Opinion of the Court delivered by the Chief Justice:

"Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently."

An appellant in a recent Eight Circuit case, decided after Miranda, supra, was given an admonition virtually identical to those employed by the narcotics agents in the instant matter, and the introduction into evidence of the admissions in that case was upheld.

Alexander v. United States, 380 F.2d 33
(8th Cir. 1967).

Clearly, the letter of the law was followed in this instance.

II

BY TAKING THE STAND AND ADMITTING THE ELEMENTS OF THE OFFENSE CHARGED, ANY ERROR IN ADMITTING THE TESTIMONY OF NARCOTICS AGENTS AS TO ADMISSIONS BY THE APPELLANT IS TOTALLY HARMLESS, AND AMOUNTS TO NOTHING MORE THAN AN ACADEMIC QUIBBLE.

Obviously, the case against appellant was so clear that he elected to set up a defense, rather than challenge plaintiff's prima facie case. Thus he admitted, even alleged, that he possessed the marijuana in question, knowingly and intentionally. He chose to rest his case upon the thoroughly incredible claim that he was entrapped. Plainly, the jury did not believe him, for he was found guilty as charged, upon both counts pleaded in the Indictment. Having himself admitted, on the witness stand and under oath, to the very same acts which were the subjects of the admissions to which the narcotics agents testified, he cannot now complain of any error in the introduction into evidence of the agents' testimony concerning those admissions, even assuming, solely arguendo, that appellant did not make a voluntary, knowing and intelligent waiver, based upon the warnings given him, as required by Miranda, supra. Such error is utterly and totally without effect upon any of his substantial rights, and therefore harmless. Being harmless, it must be disregarded.

III

IT MAY BE INFERRED FROM THE CONTENTS OF THE REPORTER'S TRANSCRIPT HEREIN THAT APPELLANT WAS PRESENT AT THE BENCH WHEN THE ARRAIGNMENT PROCEEDING IN QUESTION TOOK PLACE, AND EVEN IF HE WERE NOT, THERE IS NOTHING TO INDICATE ANY FAILURE TO COMPLY WITH THE REQUIREMENTS OF THE SIXTH AMENDMENT TO THE FEDERAL CONSTITUTION, NOR WITH THE FEDERAL RULES OF CRIMINAL PROCEDURE.

As pointed out in the statement of facts herein, where appellee quoted from the Reporter's Transcript at pages eight and nine thereof, the Court Clerk addressed the defendant in the second person on several occasions, while the arraignment proceeding was taking place at the bench. From this it may be inferred that the defendant was indeed present at the bench, although such is not expressly stated by the Court Reporter in the transcript of proceedings.

But even if the defendant were not present at the bench, there is nothing to indicate that any of his rights were violated, which had any substantial bearing upon the result ultimately reached in the course of the litigation, to-wit, his conviction for the crimes charged in the superseding indictment.

The Sixth Amendment requires merely that a trial be public; it does not forbid bench conferences; it does not prohibit proceedings out of the earshot of persons present in the courtroom.

The Sixth Amendment further requires that the accused shall be informed of the nature and cause of the accusation. In the instant case, as is customary, counsel for the defendant was handed a copy of the Indictment, and waived the reading thereof, as is also customary. Furthermore, counsel entered a plea of not guilty as to both counts, so it cannot be said that appellant admitted to charges the nature of which he was unaware. In these circumstances, it cannot be said that there was any error under the Sixth Amendment, and even if there were, it would be purely harmless, not affecting appellant's substantial rights, and therefore must be disregarded.

Rule 52, Federal Rules of Criminal Procedure.

It may be noted, in passing, that in his charge to the Jury, the District Court read the indictment aloud, so appellant is in no position to say that he never heard its contents (R. T. 342-343).

Insofar as is material hereto, Rules 10 and 43 embody the requirements of the Sixth Amendment as set forth above, and the same principles as discussed hereinabove are applicable in answering appellant's contention that the procedure in question violated those rules. Again, appellant suffered no substantial prejudice. Even assuming, for the sake of argument, that there had been a failure to comply with the letter of those rules, any purported error is harmless error, which must be disregarded.

Rule 52, Federal Rules of Criminal Procedure.

A case in point regarding irregularities in the arraign-

ment procedure is Garland v. Washington, 232 U. S. 642, 34 S. Ct. 456, 58 L. Ed 772 (1913). There it was held that a failure to comply with prescribed arraignment procedures is a mere technical irregularity not warranting a reversal unless an objection was raised when the irregularity took place. No such objection was interposed in this case. On the contrary, appellant's attorney stipulated that the trial could proceed, waiving any further notice, after the arraignment proceeding in question took place.

VI

CONCLUSION

For the reasons set forth hereinabove, the Judgment of conviction should be affirmed.

Respectfully submitted,

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N O. 2 1 8 3 0 /

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARTHUR WARTSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

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FOR THE CENTRAL DISTRICT OF CALIFORNIA

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FILED

MAY 1 1968

JIM B. LUCK, CLERK

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from a conviction of robbery of a national bank in violation of Title 18, United States Code, Section 2113(a). Appellant was indicted on December 21, 1966 [C. T. 2].^{1/} Appellant entered a plea of not guilty and trial, by jury, commenced on February 2, 1967, before the Honorable Irving Hill, United States District Judge, Central District of California. On February 3, 1967, Judge Hill, outside the presence of the jury, heard and denied a motion filed by appellant on that date to suppress evidence

^{1/} C. T. refers to Clerk's Transcript.

[R. T. 196].^{2/} On February 8, 1967, appellant was found guilty and, on February 27, 1967, was sentenced under the Young Adult Offender's Act, Title 18, United States Code, Section 4209 [R. T. 420, 436].

Jurisdiction of the District Court was based on Sections 2113(a) and 3231, Title 18, United States Code. Jurisdiction of this Court to entertain the appeal is derived from Sections 1291 and 1294, Title 28, United States Code.

II

STATUTE INVOLVED

Title 18, United States Code, Section 2113(a), provides in part:

"Whoever, by force and violence, or by intimidation, takes . . . from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management or possession of, any bank . . . shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both."

^{2/} R. T. refers to Reporter's Transcript of Proceedings.

III

STATEMENT OF FACTS

On December 7, 1966, the Bank of America, 110th and Main Street Branch, was robbed of \$1,099.00 by a single bandit at approximately 12:20 P. M. [R. T. 61, 90]. Included in the amount taken was \$100.00 of marked money [R. T. 90]. At approximately 12:40 P. M., on that date, Officer Melvin Smith of the Los Angeles Police Department entered the residence of appellant [R. T. 209]. Shortly thereafter, appellant was arrested by Officer Smith. He was then taken to the 77th Police Station where he was booked and searched [R. T. 185-186]. Fourteen of the marked bills were found in appellant's possession [R. T. 238].

On February 3, 1967, appellant moved to suppress the marked bills on the ground that they were the product of an unlawful search [R. T. 166-167]. The trial court, after holding a hearing on appellant's motion, ruled that the arrest was based upon probable cause and the subsequent search of appellant was incident to the lawful arrest [R. T. 196]. The marked bills were later admitted into evidence, over the objection of appellant [R. T. 211].

IV

SPECIFICATION OF ERROR

Appellant's opening brief raises only one issue: Did reasonable cause exist for the arrest of appellant for the robbery of the

Bank of America bank?

V

ARGUMENT

THE TRIAL COURT DID NOT ERR IN FIND-
ING THAT REASONABLE CAUSE EXISTED
FOR APPELLANT'S ARREST.

The principle that a police officer may search, without a warrant, a person whom he has validly arrested is well established. See United States v. Rabinowitz, 339 U.S. 56, 60 (1950). Appellant does not challenge this principle. Rather, he contends that the arrest was invalid and, therefore, the search which followed was also invalid.

Officer Smith, of the Los Angeles Police Department, arrested appellant at his home without a warrant. The courts have held that, under such circumstances, the validity of the arrest must be determined by looking at state law, i. e., California law in this instance. See Ker v. California, 374 U.S. 23, 37 (1963); Ferganchick v. United States, 374 F.2d 559, 560 (9 Cir. 1967), cert den., 387 U.S. 947 (1967), and Dagampat v. United States, 352 F.2d 245, 247 (9 Cir. 1965), cert den., 383 U.S. 950 (1965).

The California Penal Code, Section 836(3), (as amended in 1957), provides, in part, as follows:

"A peace officer may . . . without a warrant, arrest a person: . . . Whenever he has reasonable cause to believe that the person

to be arrested has committed a felony. . . ." 3/

The California courts have consistently held that what constitutes reasonable cause depends upon the particular circumstances in each situation. See People v. Ross, 60 Cal. Rptr. 254, 259; 429 P.2d 606, 611 (Cal. S. Ct., 1967). Whether reasonable cause exists must be determined by looking at the facts known to the arresting officer at the time he makes the arrest. See People v. Fritz, 61 Cal. Rptr. 247, 251; 253 A.C.A. 1 (Court of Appeals, 1967). His knowledge of the facts, however, need only be sufficient to lead him to believe:

" . . . [that there] is more evidence for [the arrest] than against, so that a man of ordinary care and prudence, knowing what the arresting officer knows, would be led to believe or conscientiously entertain a strong suspicion of the accused's guilt, although reserving some possibility for doubt. " People v. Murrietta, 60 Cal.

Rptr. 56, 57; 251 A.C.A. 1147 (Court of Appeals, 1967). Accord: People v. Davis, 33 Cal. Rptr. 590, 592; 220 Cal. App.2d 49 (Court of Appeals, 1963). See also, Draper v. United States, 358 U.S. 307, 313 (1958). Appellee respectfully submits that the information which Officer Smith possessed at the time he arrested appellant more than satisfies the requirements for reasonable cause.

3/ Robbery is a felony under California law. See California Penal Code §211.

A. OFFICER SMITH KNEW THE PHYSICAL
CHARACTERISTICS OF THE ROBBER.

The robbery occurred at approximately 12:20 P.M., [R. T. 61]. At approximately 12:35 P.M., Officer Smith, who was patrolling in a police car, received a description of the bank robber over the police radio. ^{4/} He testified that the robber was described as a ". . . male Negro, 22, six feet two inches, 190 pounds, black and brown, medium dark brown complected, bushy hair, [and] athletic build. . . ." [R. T. 178].

The eyewitnesses to the robbery described the robber as a "male Negro" [R. T. 89], "in his early twenties" [R. T. 89], "six [feet] two [inches]" [R. T. 58, 88], "185 pounds" [R. T. 88-89], "medium brown" [R. T. 58], "dark complected" [R. T. 102], and "medium bushy hair" [R. T. 58].

This eyewitness description of the robber is practically identical with the description which Officer Smith testified that he had received. On the basis of this similarity, it is clear that Officer Smith knew, in detail, the physical characteristics of the robber. It is also clear from this similarity that, contrary to appellant's contention that Officer Smith "put together his testimony retrospectively", (see appellant's Opening Brief, page 10) Officer Smith's pursuit of the robber was based on the information which

^{4/} It is settled that a police officer is entitled to rely upon information received through such an official source. See People v. Fritz, supra, 61 Cal. Rptr., at 251, and People v. Ross, supra, 60 Cal. Rptr. at 259.

the eyewitnesses had provided.

B. OFFICER SMITH KNEW THE DESCRIPTION
 OF THE ROBBER'S CLOTHING.

According to Officer Smith's testimony, the police radio broadcast described the robber as "wearing dark trousers, green or yellow sweater and a green and yellow shirt." [R. T. 198-199]. The bank teller who was robbed described the robber as wearing "dark slacks . . . a light olive green alpaca sweater [and a shirt which she did not notice]" [R. T. 58]. Two other eyewitnesses testified that the robber was wearing a "gray . . . or green," [R. T. 89] or "dark sweater," [R. T. 102] and "dark" [R. T. 89] trousers. The only witness who recalled the robber's shirt testified that it was "beige or light yellow or tan." [R. T. 138].

Appellant cites Officer Smith's description of the clothing of the robber as "black and yellow shirt, green sweater and dark trousers." (Emphasis added.) (See appellant's Opening Brief, p. 9.) Appellant states that none of the eyewitnesses described the robber's shirt as "black and yellow". Appellant contends, therefore, that Officer Smith must have made up the description after he had observed a black and yellow shirt in appellant's house. (See appellant's Opening Brief, pp. 9-10.)

Appellee respectfully submits that Officer Smith did initially misstate the color of the shirt as "black and yellow" but then corrected his error and stated that the shirt was "yellow and

green." 5/ Appellee further submits that this description is consistent with the description of the robber's clothing given by the eyewitnesses.

C. OFFICER SMITH KNEW WHERE THE
ROBBER HAD GONE AFTER THE ROBBERY.

The police radio broadcast which Officer Smith heard stated that the robber, after fleeing from the bank, had taken a cab to 117th Street and San Pedro [R. T. 178-179]. Officer Smith and his partner proceeded immediately to that location [R. T. 179]. Officer Smith testified that he then interviewed two people on the street to determine if they had recently observed anyone arrive in a cab at that location [R. T. 179-180]. According to Officer Smith's testimony, both people had recently observed a cab in the area [R. T. 179-180]. Furthermore, one of the people, Mr. Dudley Jenkins, described the person who had gotten out of the cab as a " ' . . . male Negro, early twenties, about six feet, about 190 pounds. ' " [R. T. 180]. Mr. Jenkins, according to Officer Smith, told him [Officer Smith], that the person had entered the house at 245 East 117th Street [R. T. 181]. After receiving this information and other information concerning the clothing the man wore, Officer Smith proceeded to the house at 245 East 117th Street [R. T. 181]. He was admitted into the house and taken into the bathroom where

5/ Cf. R. T. 178, 199 and 214.

he observed appellant taking a bath [R. T. 201].

Appellant concedes that if Officer Smith's testimony is believed, probable or reasonable cause to go to appellant's home is established. (See appellant's Opening Brief, p. 8.) However, appellant contends that Officer Smith's testimony was "completely discredited" (see e. g., appellant's Opening Brief, p. 9), and that Mr. Jenkins' testimony failed to connect the robber with appellant's house. Appellee respectfully submits that Officer Smith's testimony was not discredited ^{6/} and that Mr. Jenkins' recollection of what he told Officer Smith was in itself sufficient to point Officer Smith to appellant's house.

Mr. Jenkins testified that approximately five or six minutes before Officer Smith arrived at the intersection of 117th Street and San Pedro [R. T. 161], he observed a man carrying a "green-looking" sweater or jacket get out of a cab and cross the street ^{7/} to

^{6/} Appellee has previously pointed out that the eyewitnesses' description of the robber was practically identical with the description Officer Smith testified that he received. The only discrepancy between Officer Smith's testimony and the eyewitnesses' as to the robber's clothing was as to the shirt. The eyewitness testified that the shirt was "beige or light yellow or tan" [R. T. 138], and Officer Smith testified that he was told that the shirt was "green and yellow". [R. T. 199].

^{7/} Mr. Jenkins gave his address as 11705 South San Pedro Street, which is on the corner of 117th and South San Pedro [R. T. 156]. According to Officer Smith, the house numbered 250 East 117th Street is next to Mr. Jenkins' garage [R. T. 216], and on the opposite side of the street from appellant's house at 245 East 117th Street [R. T. 181]. When Mr. Jenkins observed the man get out of the cab, he was working on his garage [R. T. 156]; therefore, according to Mr. Jenkins' testimony that the man "crossed the street," the man would have gone toward the houses on the side of the street on which appellant lived.



some houses [R. T. 158]. Mr. Jenkins was further able to recall that the man went toward the first two or three houses [R. T. 158] across the street. (Appellant lived in the third house [R. T. 274].)

Under these circumstances, Officer Smith had a duty to continue his investigation. He had enough information to entitle him to go to appellant's house to interrogate him.^{8/} As the California Court of Appeals stated in People v. McCottry, 23 Cal. Rptr. 309; 205 Cal. App. 2d 698 (Court of Appeals, 1962):

"When police officers have suspicions concerning criminal activities it is proper for them 'to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes.' "

[Citations of authority omitted.] 23 Cal. Rptr. at 312.

Accord: Frye v. United States, 315 F. 2d 491, 494 (9 Cir. 1963), cert den., 375 U. S. 849 (1963)

Appellee respectfully submits that it is immaterial whether Mr. Jenkins specifically directed Officer Smith to appellant's house or whether Officer Smith, based on the information he received from Mr. Jenkins, determined to approach appellant's house. The fact is that the first, and only, house which Officer Smith approached was appellant's [R. T. 191]. The testimony of either

^{8/} The California decisions indicate that a police officer is entitled to interrogate a suspect on the basis of less information than is required to support a warrantless arrest. See People v. Gamboa, 235 Cal. App. 2d 444; 45 Cal. Rptr. 393, 395 (Court of Appeals, 1965).

witness, therefore, establishes probable cause to approach appellant's house.

D. APPELLANT VOLUNTARILY ADMITTED
OFFICER SMITH INTO HIS HOME AND
SHOWED HIM THE CLOTHES HE HAD
BEEN WEARING.

At approximately 12:40 P. M., less than 30 minutes after the robbery had taken place, Officer Smith arrived at 245 East 117th Street, appellant's home [R. T. 209]. He was met at the door by a Negro woman, Mrs. Dorothy Mae James [R. T. 220]. When Officer Smith questioned Mrs. James, she told him that a Negro male lived at that address and described him as being "six-feet, about 200 pounds, medium complexion"[R. T. 182]. ^{9/} Officer Smith asked to speak with the man and Mrs. James told Officer Smith and his partner to come into the house [R. T. 182]. Appellant, who was in the bathroom at the time, told Officer Smith to come into the bathroom [R. T. 183]. In response to Officer Smith's request that he step out of the bath tub [R. T. 183], appellant put on a pair of dark green pants and he and Officer Smith walked into the bedroom where appellant put on a black and yellow shirt [R. T. 202]. Officer Smith asked appellant if he had had on any other

^{9/} Appellant contends that Officer Smith's testimony as to Mrs. James' description of appellant smacks of police professionalism. (See appellant's Opening Brief, pp. 9-10) However, Mrs. James did not testify and Officer Smith's testimony as to how Mrs. James described appellant was not controverted at the trial.

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At approximately 12:40 P. M. , less than 30 minutes after the robbery had taken place, Officer Smith arrived at 245 East 117th Street, appellant's home [R. T. 209]. He was met at the door by a Negro woman, Mrs. Dorothy Mae James [R. T. 220]. When Officer Smith questioned Mrs. James, she told him that a Negro male lived at that address and described him as being "six-feet, about 200 pounds, medium complexion"[R. T. 182]. ^{9/} Officer Smith asked to speak with the man and Mrs. James told Officer Smith and his partner to come into the house [R. T. 182]. Appellant, who was in the bathroom at the time, told Officer Smith to come into the bathroom [R. T. 183]. In response to Officer Smith's request that he step out of the bath tub [R. T. 183], appellant put on a pair of dark green pants and he and Officer Smith walked into the bedroom where appellant put on a black and yellow shirt [R. T. 202]. Officer Smith asked appellant if he had had on any other

^{9/} Appellant contends that Officer Smith's testimony as to Mrs. James' description of appellant smacks of police professionalism. (See appellant's Opening Brief, pp. 9-10) However, Mrs. James did not testify and Officer Smith's testimony as to how Mrs. James described appellant was not controverted at the trial.

clothing when he entered the house and appellant showed him a green and yellow sweater which he stated he had also had on [R. T. 202]. Appellant and Officer Smith then left the house and Officer Smith arrested appellant for the robbery of the bank [R. T. 203].

E. OFFICER SMITH DID NOT ARREST APPELLANT UNTIL AFTER HE HAD SEEN APPELLANT'S CLOTHING AND HE AND APPELLANT HAD LEFT THE HOUSE.

Appellant contends that Officer Smith placed appellant under arrest when Officer Smith stepped into the bathroom. (See appellant's Opening Brief, p. 14) Appellant's testimony, however, indicates that appellant did not consider himself under arrest until the police officers handcuffed him [R. T. 281-282]. He was not handcuffed until he and the officers had left the house and had proceeded to the officers' car [R. T. 281-282].

When appellant's testimony is considered along with Officer Smith's testimony, it is clear that appellant was not placed under arrest, as that term is used in Sections 834 and 835 of the California Penal Code, until he was outside the house. Even if the facts are viewed in the light most favorable to appellant, Officer Smith's drawing of his gun when talking to appellant in the bathroom [R. T. 225] amounted to nothing more than a brief detention of appellant. It is settled in this Circuit that such a brief detention is not necessarily unlawful. As this Court recently stated:

"We take it as settled that there is nothing



ipso facto unconstitutional in the brief detention of citizens under circumstances not justifying an arrest, for purposes of limited inquiry in the course of routine police investigations. Rios v. United States, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688 (1960); Busby v. United States, 296 F.2d 328 (9th Cir. 1961). . . . [D]ue regard for the practical necessities of effective law enforcement requires that the validity of brief, informal detention be recognized whenever it appears from the totality of the circumstances that the detaining officers could have had reasonable grounds for their action. A founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing."

Wilson v. Porter, 361 F.2d 412, 415 (9 Cir. 1966). Accord: Davis v. People of State of California, 341 F.2d 982, 986 (9 Cir. 1965), and Gilbert v. United States, 366 F.2d 923, 928 (9 Cir. 1966), cert. den., 388 U.S. 922 (1967).

VI

SUMMATION OF ARGUMENT

The only issue in this case is whether reasonable cause for arresting appellant existed at the time Officer Smith made the

arrest. This issue was raised by appellant in the trial court and the trial court determined that the arrest was based upon reasonable cause. The trial court's decision is not binding upon this Court but it is entitled to some weight. See Blackford v. United States, 247 F.2d 745 (9 Cir. 1957), cert. den., 356 U.S. 914 (1958).

In reviewing the evidence in this case, appellee respectfully submits that this Court must view the evidence in the light most favorable to the Government. Noto v. United States, 367 U.S. 290, 296 (1961) and Redmon v. United States, 355 F.2d 407, 411 (1966). Appellee further submits that the reasonableness of the arrest should not be determined by looking at each item of information individually; rather, the test is whether all the information, considered in its totality, in Officer Smith's possession at the time he made the arrest was sufficient to provide reasonable cause. See People v. Fritz, supra, 61 Cal. Rptr. at 251 and People v. Gamboa, supra, 45 Cal. Rptr. at 395.

Turning to the facts, in summary, the record below shows:

1. It was known that the robber had taken a cab to the intersection of 117th Street and San Pedro [R. T. 175].

2. Officer Smith arrived at that intersection approximately five minutes after a man, matching the description that Officer Smith had received of the robber, had arrived in a cab at 117th Street and San Pedro [R. T. 158-161, 180-181].

3. After interviewing two people at the intersection, Officer Smith went directly to appellant's house, the third house from the intersection [R. T. 191, 274].



4. When Officer Smith arrived at appellant's house, he was met by a woman who gave him a physical description of appellant [R. T. 182]. This description matched the robber's description which Officer Smith had received over the police radio [Cf. R. T. 198 and 182].

5. Officer Smith was voluntarily admitted into appellant's house at approximately 12:40 P. M. [R. T. 209], approximately fifteen or twenty minutes after the robbery had taken place.

6. Appellant voluntarily showed Officer Smith the clothes that he had been wearing [R. T. 183]. Appellant's pants and sweater matched the general description of the robber's clothing which Officer Smith had received over the police radio [Cf. R. T. 202 and 198].

7. Officer Smith and appellant left the house and Officer Smith then arrested appellant for the robbery [R. T. 184].

Appellee respectfully submits that when Officer Smith arrested appellant the information in his possession indicated that appellant was the robber. There was more evidence of appellant's guilt than there was against it. The information in his possession provided Officer Smith with sufficient reasonable cause to arrest appellant.

VII

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ George G. Rayborn
GEORGE G. RAYBORN

No. 21831 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT NEWTON GARDNER, JR.,

Appellant,

vs.

WILLIAM E. ST. JOHN, etc., *et al.*,

Appellees.

BRIEF OF APPELLEES.

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FILED

DEC 20 1967

WM. B. LUCK. CLERK

DEC 21 1967



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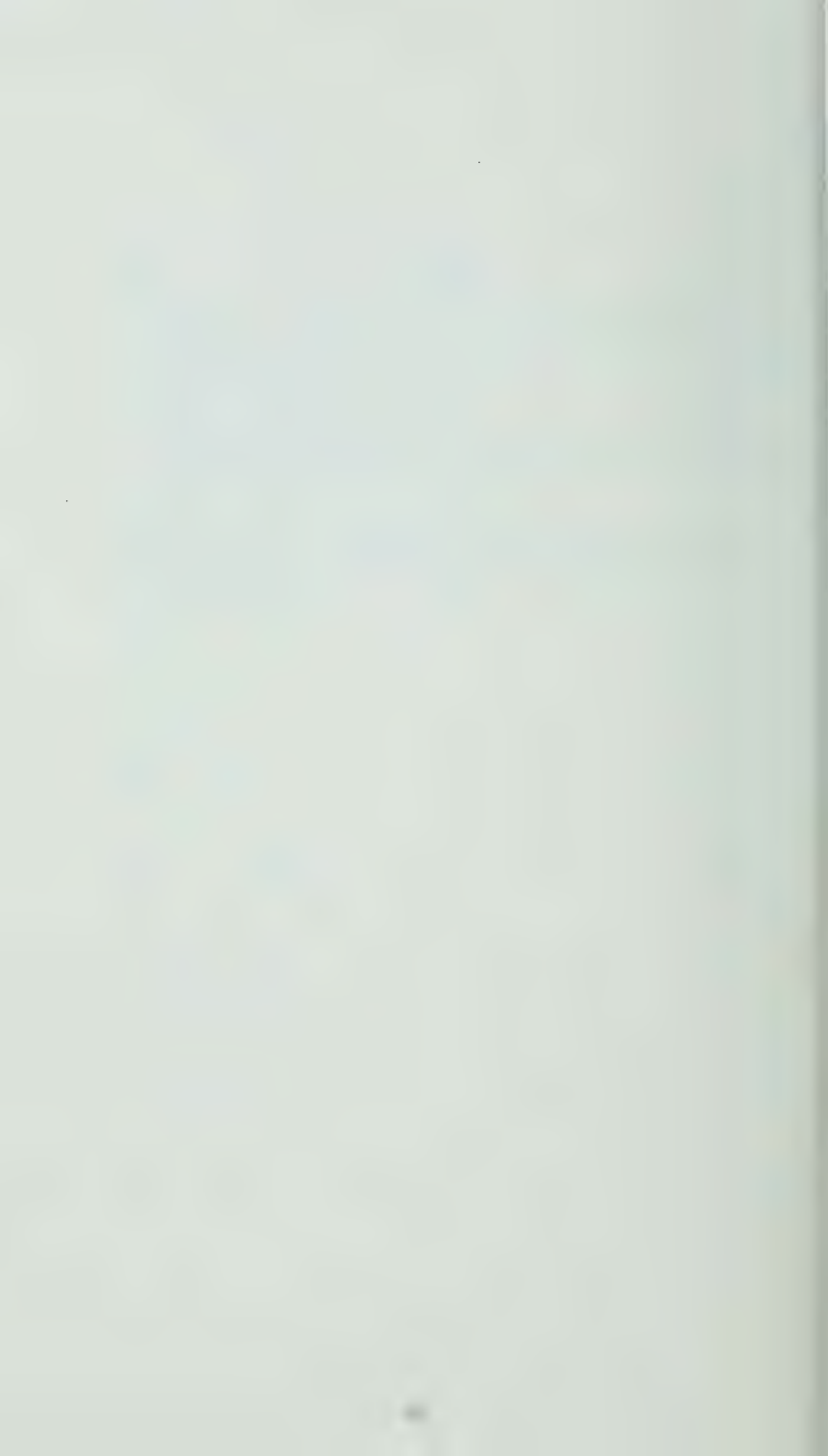
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ROBERT NEWTON GARDNER, JR.,

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Appellees.

BRIEF OF APPELLEES.

Statement of Jurisdiction.

In this brief we will refer to the appellant as plaintiff, and to the appellees as defendants.

Plaintiff's complaint, which was filed in the District Court for the Southern District of California, Central Division (now the Central District), alleges that it is an action for violation of civil rights, and that the District Court has jurisdiction pursuant to 42 U.S.C.A. 1983 and 1985; and 28 U.S.C.A. 1331 and 1343(3) and (4). [Clk. Tr. 3.]

On motion of the defendants [Clk. Tr. 32], the district court dismissed the complaint for failure to state a claim upon which relief can be granted. [Clk. Tr. 71.]

The plaintiff appealed [Clk. Tr. 87], and this court has jurisdiction of the appeal pursuant to 28 U.S.C. 1291.

The third cause of action, which is the last, is apparently intended to show how the plaintiff was prejudiced by the failure to furnish him with a transcript. Therein it is alleged that the plaintiff was delayed forty-five months in seeking a collateral remedy, and that the appellate court in denying relief made reference to the fact that he had delayed seeking such remedy. [Clk. Tr. 11-12.] The plaintiff then says that the same facts complained of in this case were presented to the California court. The complaint alleges: "The record in that court did show that the plaintiff presented the reasons for the delays and among those was the act of the defendants in their failure to provide transcripts as ordered by the court." [Clk. Tr. 12, lines 11-14.]

In addition to the complaint, the court may take judicial notice of the opinion of the California District Court of Appeal in *People v. Gardner*, 4 Crim. No. 2153. This opinion is reproduced in the record [Clk. Tr. 37-39], and it is referred to in the plaintiff's complaint. [Clk. Tr. 12, lines 14-15.] The opinion of the District Court of Appeal shows, among other things, that the plaintiff could not have been deprived of a transcript of his trial because he pled guilty and had no trial, and that the basis of the court's opinion in denying post-conviction relief was that the federal standards upon which the plaintiff relied were not applicable at the time of his conviction and would not be given retroactive application. [Clk. Tr. 37-39.]

Summary of Argument.

1. The defendants, being quasi-judicial officers, are immune from suits for damages under the civil rights statutes. The only exception to the immunity of a

judge, prosecutor, clerk or other judicial or quasi-judicial officer is when there is a clear absence of all jurisdiction over the subject matter. It is not sufficient to allege that the defendant acted in excess of his jurisdiction.

2. The complaint shows on its face that the plaintiff's claim is barred under the doctrines of *res judicata* and collateral estoppel. The complaint alleges that the same alleged wrongful acts of the defendants were presented to the California court in a petition for post-conviction relief, that the California court denied relief, and that the California judgment is final.

3. The opinion of the California District Court of Appeal shows that the essential allegations of the complaint are not true. The complaint alleges that the plaintiff was deprived of a transcript of his trial. The opinion of the Court of Appeals shows that the plaintiff pled guilty and did not have a trial. The complaint alleges that the failure to furnish a transcript delayed his petition for post-conviction relief and that this was the basis for denying relief. The opinion of the District Court of Appeals shows that the basis of the decision was that the federal standards upon which the plaintiff claimed to be entitled to relief were not applicable at the time of his conviction and would not be given retroactive application.

4. Even if the allegations of the complaint are accepted at face value, they do not state a claim for relief. There are no facts alleged and none can be inferred to explain how the plaintiff was or could have been damaged by the failure to furnish him with a transcript.

ARGUMENT.

I.

The Defendants Are Immune From Suits for Damages Under the Civil Rights Statutes.

The defendants are the District Attorney of Orange County, the County Clerk, a Deputy District Attorney and a Deputy County Clerk. As such, they are quasi-judicial officers and are immune from suits for damages based on their acts performed under the scope and authority of their offices, unless there is a clear absence of all jurisdiction over the subject matter.

In *Sires v. Cole* (9th Cir. 1963), 320 F. 2d 877, the plaintiff sued a judge of Kittitas County, Washington, the county prosecutor, a deputy prosecutor, and the county. The complaint sought damages and alleged that the defendants had tricked the plaintiff into entering a plea of guilty to a misdemeanor and then sentenced him to a term in prison as if he had been guilty of a felony. The district court dismissed the complaint for various reasons, but not on a ground that the defendants were immune from suit for damages. The district court also found that the facts alleged by the plaintiff were true in that it issued a writ of habeas corpus. On appeal from the order dismissing the complaint, this court said: "We need not decide whether any of the reasons stated by the district court for dismissing the action have merit because there are reasons for dismissal, manifest on the face of the complaint, which in any event require us to affirm." (320 F. 2d at 879.) The court then held that counties, judges and prosecutors are im-

mune from suits for damages under the Civil Rights Act. A judge has such immunity without regard to his motives and notwithstanding that his acts may have been performed in excess of jurisdiction, provided there is not a clear absence of all jurisdiction over the subject matter. (320 F. 2d at 879.) Prosecutors have the same immunity as judges:

“The remaining defendants are the prosecuting attorney and a deputy prosecuting attorney of Kit-titas County. A prosecuting attorney is a quasi-judicial officer and enjoys the same immunity from a civil action for damages as that which protects a judge. . . . For this reason the action was properly dismissed as to these remaining defendants.” (320 F. 2d at 880, citations omitted.)

In *Harmon v. Superior Court* (9th Cir. 1964), 329 F. 2d 154, the County Clerk of Los Angeles County was included as one of the defendants, together with certain other County officials. In affirming an order dismissing the action as to all defendants, the court said:

“The acts of the ‘prosecuting defendants’ complained of were ‘quasi-judicial’ acts done by them in the exercise of their quasi-judicial functions, and under a similar, if not a same, immunity.” (329 F. 2d at 155.)

In *Agnew v. Moody* (9th Cir. 1964), 330 F. 2d 868, the plaintiff sued police officers, deputy city attorneys, and a judge of the Los Angeles Municipal Court, together with his reporter, clerk and bailiff. The judge’s clerk would, of course, be a deputy clerk. The

court held that the judge was immune. It was not necessary to reach the question of immunity as to the clerk, bailiff and reporter as they “were too remote and inconsequential to form the basis of a claim”, but the court makes this statement:

“Appellant has not contended that immunity, if available to the Judge, did not extend to his clerk, bailiff, and reporter. The Supreme Court has said, ‘a like immunity extends to other officers of government whose duties are related to the judicial process’ . . . , and the duties of clerks, bailiffs, and reporters clearly are.” [330 F. 2d at 870, citations omitted.)

In the case now under consideration, the complaint affirmatively shows that each of the defendants is a quasi-judicial officer and thus entitled to immunity from suits for damages. There is no allegation that there was a clear absence of all jurisdiction over the subject matter. The complaint does allege “excess of jurisdiction”, but that sort of allegation has been expressly held to be insufficient. (*Sires v. Cole* (9th Cir. 1963), 320 F. 2d 877, 879.) The very nature of the plaintiff’s claim shows that there was jurisdiction. The plaintiff’s alleged grievance is that these defendants, while acting “under the scope and authority of their offices”, disobeyed an order of court with respect to furnishing the plaintiff with a transcript. Assuming that is true, the most that can be said is that they exceeded their authority in respect of a matter within their jurisdiction, *i.e.*, within the scope and authority of their offices.

II.

The Plaintiff's Claim Is Barred Under the Doctrines of Res Judicata and Collateral Estoppel.

The complaint specifically alleges that the same facts which form the basis of this action were presented to the California District Court of Appeal in the prior criminal proceeding, that the plaintiff's claim for relief in that proceeding was denied, and that the judgment is final. [Clk. Tr. 12, lines 7-25.]

Under the doctrine of *res judicata* a party is precluded from litigating the same claim over again. (*Bernhard v. Bank of America* (1942), 19 Cal. 2d 807, 813 [122 P. 2d 892].) If the subsequent lawsuit is not based on the identical cause of action but involves the same facts, the plaintiff is collaterally estopped from re-litigating those facts. (*Klinell v. Shirey* (1963), 223 Cal. App. 2d 239, 243-244 [35 Cal. Rptr. 901].) The doctrine of collateral estoppel is applicable to a civil action involving facts adjudicated in a prior criminal proceeding. (*Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd.* (1962), 58 Cal. 2d 601, 604 [25 Cal. Rptr. 559, 375 P. 2d 439].)

These principles have, in effect, been applied to suits for damages under the Civil Rights Act. In *Curtis v. Tower* (6th Cir. 1959), 262 F. 2d 166, the plaintiff had been convicted, and two petitions for habeas corpus had been denied. He then sued for damages under the civil rights statutes. In affirming a dismissal of the action, the court said:

"The judgment of the State Court, if not vacated, corrected, or amended by the state reviewing courts, or set aside by the Federal Court for

invasion of a federal constitutional right, must be accepted by us as in full force and effect unless it is vacated by a state or federal court for some invasion of federal constitutional right. No such adjudication is perceived of record or urged in brief or argument and there has been no appeal from the several judgments overruling petitions for writs of habeas corpus in the District Court. If the State Court judgment is valid, the appellant has not been injured and his complaint in the District Court sets forth no cause of action under the Civil Rights Act.” (262 F. 2d at 167.)

III.

The Opinion of the California District Court of Appeal Shows That the Essential Allegations of the Complaint Are Not True and That No Claim for Relief Is or Can Be Stated.

A motion to dismiss normally admits the allegations of the complaint. But as this court held in *Interstate Natural Gas Co. v. So. Calif. Gas Co.* (9th Cir. 1953), 209 F. 2d 380, at 384: “A motion to dismiss pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure, 28 U.S.C.A. admits all well-pleaded facts, but does not admit facts which the court will judicially notice as not being true nor facts which are revealed to be unfounded by documents included in the pleadings or introduced in support of the motion.” The fact of which the court took judicial notice in the *Interstate Natural Gas* case was a contract referred to in the complaint but not attached to it, which was filed with the court in support of the motion to dismiss.

The federal courts, of course, take judicial notice of the decisions of the state courts. (*Odom v. Langston*

(D.C.W.D. Mo. 1948), 75 F. Supp. 651, 653; *LaBelle v. Hancock* (D.C.N.H. 1955), 134 F. Supp. 273, 275.) A copy of the opinion of the California District Court of Appeal in *Pcople v. Gardner*, 4 Crim. No. 2153, was filed in support of the motion to dismiss in this case, and that opinion is also specifically referred to in the plaintiff's complaint. [Clk. Tr. 12, lines 14-15.]

The opinion of the California District Court of Appeal is significant in two respects when compared to the plaintiff's complaint. The plaintiff claims in his complaint that he was denied a transcript of his trial. [Clk. Tr. 6, lines 1-10; Clk. Tr. 10, lines 16-23.] The opinion shows, however, that the plaintiff pled guilty and consequently there was no trial. [Clk. Tr. 37.] Nevertheless, let us assume that the plaintiff was denied some sort of a transcript. The plaintiff claims that the result of this was that he was delayed forty-five months in petitioning for post-conviction relief, and that this delay was the cause of the denial of such relief. [Clk. Tr. 11-13.] In the first place, it does not follow, particularly in view of the allegations of the complaint, that the failure to furnish the transcript was the cause of the delay in filing the petition for post-conviction relief. The complaint does not allege that the plaintiff finally got the transcript and then filed the petition. The allegation is that he filed the petition after learning that he had been denied the transcript. [Clk. Tr. 9-10.] But again, assume further that the failure to furnish the transcript was the cause of the delay. The opinion of the District Court of Appeal shows that this was not the reason for denying the petition. The plaintiff was claiming that illegally-

obtained evidence, within the meaning of *Escobedo v. Illinois* (1964), 378 U.S. 478 [12 L. Ed. 2d 977, 84 S. Ct. 1758]; and *Mape v. Ohio* (1961), 367 U.S. 643 [6 L. Ed. 2d 1081, 81 S. Ct. 1684], had been used against him. The basis of the decision of the District Court of Appeal in denying post-conviction relief was that these cases were decided by the United States Supreme Court after the plaintiff's conviction and would not be applied retroactively. [Clk. Tr. 39.]

IV.

The Complaint Is Deficient Because It Fails to Allege Any Facts to Show How the Plaintiff Was or Could Have Been Damaged by Failure to Furnish Him With a Transcript.

The plaintiff has cited one case, *Washington v. Official Court Stenographer* (D.C. E.D. Pa. 1966), 251 F. Supp. 945, which held that a cause of action was stated against the reporter for failure to furnish a transcript when two judges had made orders that the transcript be provided. We submit that the *Washington* case is distinguishable, and in any event should not be followed in this Circuit.

The *Washington* case is distinguishable in this respect. Therein, as here, the plaintiff alleged only the conclusion that he needed the transcript to prepare a petition for post-conviction relief. The court held that this in itself was not a sufficient allegation, but that a need for the transcript could be inferred from the allegation that two judges had ordered the transcript. (251 F. Supp. at 947.) Here the facts are not the

same. The complaint alleges that when the plaintiff renewed his motion for procurement of the record, his second motion was denied. [Clk. Tr. 9, lines 8-16.] Furthermore, the opinion of the District Court of Appeal shows that the alleged failure to furnish the transcript, indeed the transcript itself, was immaterial. The only claim the plaintiff made in that proceeding was that certain Supreme Court cases decided after his conviction invalidated his conviction, and the court said it would not apply those cases retroactively. [Clk. Tr. 39.]

The *Washington* case also holds that actual damage is not essential to a cause of action under the Civil Rights Act, and that merely nominal and punitive damages may be recovered. (251 F. Supp. at 947.) This general statement is acceptable in some situations, but we submit that it was incorrectly applied by the Pennsylvania District Court in the *Washington* case. The only case cited for this proposition in the *Washington* case is *Basista v. Weir* (3rd Cir. 1965), 340 F. 2d 74. *Basista v. Weir* involved an aggravated and unjustified assault and battery in connection with an arrest. The sole point at issue on damages was whether the plaintiff's counsel had waived general compensatory damages at pretrial in stating that no special damages were claimed, such as medical and wage loss. (340 F. 2d at 84-88.) Having been unjustifiably beaten on the head with a billy club (340 F. 2d at 77), the plaintiff had obviously sustained general compensatory damages as is true in any personal injury case. We submit that the situation is different when the alleged deprivation of rights



IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

KENYON FARMS, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

BRIEF FOR THE APPELLANT

CARL EARDLEY,
Acting Assistant Attorney General,

SYLVAN A. JEPPESEN,
United States Attorney,

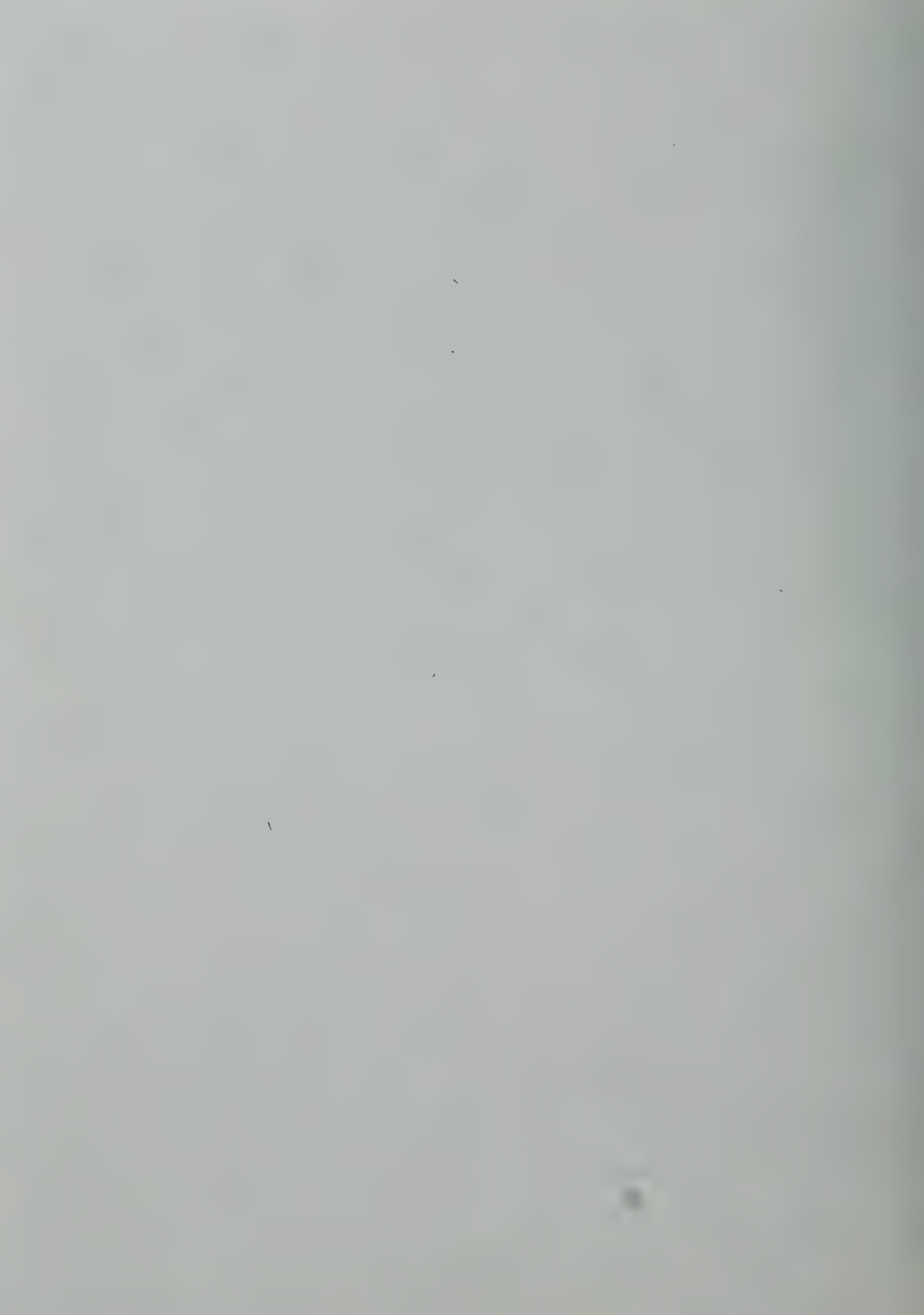
JOHN C. ELDRIDGE,
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The clause in the Government's properly recorded crop mortgages covering crops grown by Martindale on all lands leased in Cassia County, Idaho, constituted constructive notice to Kenyon Farms of the Government's lien on crops grown by Martindale on its lands in Cassia County. A reasonably diligent person would have read and understood the clause, though it was in small print.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21832

UNITED STATES OF AMERICA,

Appellant,

v.

KENYON FARMS, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

BRIEF FOR THE APPELLANT

JURISDICTIONAL STATEMENT

The appellant United States brought this action in the United States District Court for the District of Idaho, seeking to recover damages for conversion by the appellee of potatoes and other crops on which appellant held a crop and chattel mortgage. Jurisdiction of the district court was founded on 28 U.S.C. 1345, and was not contested. On January 5, 1966, after trial, the district court entered judgment for the appellee dismissing the complaint (R. 32). Upon motion of the appellant, the district court reopened the case for the taking of further evidence (R. 36). On

December 20, 1966, after the taking of further testimony, the district court entered an amended judgment, again dismissing the complaint (R. 52). The United States has taken this appeal from that judgment in favor of the appellee. The jurisdiction of this court is based upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

This action was brought by the United States against the appellee, Kenyon Farms, a corporate farm in Idaho, for conversion of potatoes and other crops on which the Farmers Home Administration held a crop and chattel mortgage. The crop and chattel mortgage was obtained as security for loans made by the Farmers Home Administration in 1957, 1959 and 1960 to Mr. and Mrs. Blaine P. Martindale (R. 10). Prior to 1960, Martindale was a tenant on a farm owned by Mr. W. B. Whiteley, located in Cassia County, Idaho. Beginning in 1960, Martindale also was a tenant on a farm owned by Kenyon Farms, Inc. (of which Whiteley was President and in which he held a large interest, (R. 50), located about 12 miles from the Whiteley farm, but also in Cassia County. The district court found after the second trial session, ~~that~~ Martindale had a one-half interest in the crops grown on the part of Kenyon farms which he was leasing (R. 48). ^{1/}

^{1/} The district court after the first trial had found that Martindale had no interest in the crops grown on Kenyon Farms in the crop years 1961 and 1962 (R. 30). The court, however, granted the motion to re-open the case on the ground of surprise, noting that the appellee's answer (R. 21) had admitted that Martindale was its tenant under a lease arrangement (R. 36). As noted, after hearing further testimony on the nature of the arrangement between Kenyon Farms and Martindale, the district court found that Martindale had a one-half interest in the crops (R. 48).

In March 1960, and March 1962, the Farmers Home Administration properly recorded its Crop and Chattel Mortgages in the Cassia County Recorder's Office (Tr. 34). The mortgages covered the Borrower's (Martindale's) interest in "all crops now standing, planted, sown, growing, or grown and all crops that may be standing, planted, sown, growing or grown within two (2) years after the date hereof, on the land described hereinafter, and on any other lands owned, leased, or controlled by the Borrower in the county(ies) identified hereinafter or in an other county(ies) in the State of Idaho . . ." (R. 10, emphasis added).

In the crop years of 1960 and 1961, Martindale's half interest in the potatoes and other crops grown on the Kenyon Farms tract was sold by Kenyon Farms to Idaho Potato Processers, Inc., of which Whitely² was an officer (Tr. 50). The proceeds, however, were not paid to Martindale (Tr. 12-13, 16-18), but instead were credited to a pre-existing indebtedness of Martindale to Whiteley (R. 28). In short, Kenyon Farms used the crops covered by Farmers Home Administration mortgages, in order to pay unsecured debts of Martindale.

The district court, however, refused to hold Kenyon Farms liable as a converter of the crops. It held that Kenyon Farms did not have constructive notice that the crops grown on its land were covered by the Farmers Home Administration crop mortgages, because (a) the Kenyon Farms tract was not specifically described in the mortgage, and (b) the clause in the mortgage (R. 10)

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covering crops "on all other lands leased in the county" was in "very small print" (R. 49). The court thought that the mortgage would mislead "even a careful examiner," because the description of the Whiteley property was in prominent type (viz., it was typed onto the form), but the clause covering any other lands was in fine print. The court stated that "the form of the mortgage is a trap, and . . . a reasonable person, using due diligence, would very likely, on an examination of an examination of the instrument, fail to perceive that other property was intended to be covered by the mortgage" (R. 49). It does not appear, however, that Kenyon Farms made such an examination, diligent or otherwise.

SPECIFICATION OF ERRORS

1. The district court erred in concluding that the chattel and crop mortgages in question did not give the appellee constructive notice of the appellant's lien on Martindale's interest in the crops grown on the land owned by the appellee.

2. The district court erred in concluding that the appellee had not converted any property on which the appellant had a lien of which appellee had legally binding notice.

3. The district court erred in dismissing the complaint, rather than entering judgment in favor of the appellant.

SUMMARY OF ARGUMENT

The properly recorded mortgage in question constituted constructive notice to Kenyon Farms of the Government's lien on Martindale's interest in the crops grown on Kenyon Farms' lands. The district court's holding that the clause of the mortgage

covering crops grown on lands not specifically described, was not constructive notice to Kenyon Farms because it was in "fine print," is untenable. A reasonably diligent corporate farm about to sell thousands of dollars worth of its tenant's crops must be expected to take the trouble not just to go to the county recorder's office--as the law clearly requires--but to read a few sentences on the first page of a crop mortgage, even if they are in small print. No diligent person who actually went to the county recorder's office would have failed to read the clause in question, covering crops grown on all lands in the county, including those not specifically described. The clause is written in plain, understandable English, and the print is easily readable. The form of the mortgage is not a "trap"; the significance of the material typed onto the form--which the district court apparently thought was the only material which a reasonable person would read--is not apparent until one reads the smaller type in which all of the mortgage is printed.

ARGUMENT

THE CLAUSE IN THE GOVERNMENT'S PROPERLY RECORDED CROP MORTGAGES COVERING CROPS GROWN BY MARTINDALE ON ALL LANDS LEASED IN CASSIA COUNTY, IDAHO, CONSTITUTED CONSTRUCTIVE NOTICE TO KENYON FARMS OF THE GOVERNMENT'S LIEN ON CROPS GROWN BY MARTINDALE ON ITS LANDS IN CASSIA COUNTY. A REASONABLY DILIGENT PERSON WOULD HAVE READ AND UNDERSTOOD THE CLAUSE, THOUGH IT WAS IN SMALL PRINT.

The district court absolved the appellee, Kenyon Farms, of conversion of crops covered by the Government's Crop and Chattel Mortgages on the sole ground that the clause in the mortgages

(R. 10) covering "all crops...grown...on any other lands...leased ...by the Borrower in the county" did not constitute notice to Kenyon Farms because it was in "small print." There is not, and could not be, any suggestion that the clause is invalid, or that its meaning is difficult to understand. See, e.g., Livestock Credit Corp. v. Corbett, 53 Idaho 190, 22 P. 2d 874 (1933). Moreover, if Kenyon Farms did have constructive notice of the clause, it is beyond question that its sale of Martindale's interest in the potatoes and other crops constituted a conversion. E.g., United States v. Matthews, 244 F. 2d 626 (C.A. 9); United States v. White, 143 F. Supp. 754 (D. Idaho).

The sole question, then, is whether a reasonably diligent person would have taken notice of the clause. ^{2/} The district court committed clear error in ruling that the clause did not constitute notice to a reasonably diligent person. The law requires a reasonably diligent person to take the trouble to go to the county recorder's office and search the records for chattel mortgages, at pain of being held liable for conversion. Surely, anyone who actually did go to the county recorder's office and conduct the required search, would have been completely lacking

^{2/} Cf. Williston on Contracts (3d ed. 1957) §90C: "In the cases where the courts have qualified the principle that acceptance of the document implies acceptance of its terms, the test frequently applied is whether a reasonably careful person would have seen the clause or could have been expected to see it."

in diligence if he did not, once he found the Farmers Home Administration mortgage, take the few additional seconds necessary to read approximately three sentences on the first page of the mortgage (R. 10).

Under the district court's ruling, it appears that someone who went to the Cassia County recorder's office and found the mortgages in question would not have to read any of the operative terms, all of which are in the same size print.^{3/} Yet it is hornbook law that all purchasers are on constructive notice of all terms of a properly recorded mortgage or deed. E.g., Ochoa v. Hernandez, 230 U.S. 139, 164; Northwestern Bank v. Freeman, 171 U.S. 620, 629 ("A purchaser is charged with notice of every fact shown by the records, and is presumed to know every other fact which an examination suggested by the records would have disclosed"). The essence of a recording system is that subsequent purchasers are bound to read the terms of deeds or mortgages they find; and they must go to the appropriate recorder's office for that very purpose. We have found not a single case which suggests that such purchasers may be relieved of that obligation when they find a mortgage in small, though perfectly readable type, much less one that holds that failure to read only three sentences on the front page of the mortgage may be excused for that reason.

3/ The decision below, might well render unenforceable as against purchasers from mortgagors of the Farmers Home Administration every substantive term of every single FHA crop and chattel mortgage in Idaho.

The district court thought that Kenyon Farms was not on notice of the clause covering crops grown on its lands by Martindale, because the form of the mortgage was a "trap" which would mislead it not to read the clause. The only reason assigned for that conclusion is that the specific description of Whiteley's property is in larger print than the clause which covers all other lands in the county; i.e., it is typed onto the form. We submit that that consideration would not have led even a lax person to miss the clause in question, much less a businessman meeting the high standard of attentiveness to the terms of recorded mortgages heretofore always required. As already noted, all the substantive terms of the mortgage are in the same size print, and surely no one finding a crop mortgage on Martindale's crops would think he could ignore all its terms. A prospective buyer with minimal curiosity would read the crucial clause "II. THE BORROWER does hereby mortgage the Government, his interest in..." The significance of the specific description of the "W.B. Whiteley Lease" is not apparent until the clause which the court below held was not notice is read. Thus, one seeing the specific description would be led to read the clause immediately preceding it, not "trapped" into not reading the clause.

The factors which occasionally have led the courts to hold clauses in various documents--though never in recorded mortgages--not binding because in fine print, are notably absent here. The clause covering crops grown by the borrower on all lands in the

county, as well as on the specifically described property, is not a "trick" provision, which a purchaser would not expect to find in a crop mortgage. On the contrary, such provisions have been used in Idaho for more than 30 years, with the express approval of the Supreme Court of that State. Livestock Credit Corp. v. Corbett, 53 Idaho 190, 22 P. 2d 874 (1933). A reasonably diligent corporate farm about to purchase or sell thousands of dollars of its tenant's crops, should be looking for that very clause. In the present case Kenyon Farms could have found it in seconds.^{4/} It seems significant that even the sharecropper, Mr. Martindale, was able to discern that "the mortgage seemed to cover anything that I would operate" (Tr. 11).

The clause is easily readable. It is not buried in a mass of small print in an obscure place in the document, but is on the first page, in a short, readable sentence. The type is leaded, not run together.^{5/} Moreover the clause is in plain English, not

^{4/} At trial, Kenyon Farms pointed to the fact that prior to 1960, the FHA did not use the clause in the form appearing in the 1960 and 1962 mortgages in question (Tr. 36-38). However, there is no evidence that officers of Kenyon Farms knew what forms FHA used either before or after 1960, and hence no evidence that Kenyon Farms (or anyone else) was misled by the change in form.

^{5/} Contrast Insurance Co. v. Slaughter, 12 Wall. (79 U.S.) 404, where the Court commented unfavorably on the inclusion of an unusual clause which an insured would not expect to find, and which was alledged by the insurance company to modify language in larger print, which was followed by, "in a smaller type, not leaded, eight paragraphs, covering the rest of the sheet, and making a solid body of finely printed matter..."

in confusing legalisms which a layman might find difficult to understand, or might be discouraged from reading. And, of course, as already stressed, a recorded mortgage is not the kind of document, which, like a "contract of adhesion," comes before the reader in circumstances in which experience teaches he is likely to pay attention only to terms in prominent type (e.g., when accepting a ticket at a parking lot or boarding a plane). ^{6/}

While it is a salutary rule that a term in a document which one cannot fairly be expected to notice does not bind him, that rule does not excuse lack of ordinary care in reading legal documents. Nor is it the law that a businessman may routinely be absolved of the consequences of his failure to read a legal document, on the ground that the document, though readable, was in small print.

Compare Westinghouse Elec. Co. v. Murphy, Inc., 425 Pa. 166, 228 A. 2d 656 (1967), with Cutler Corp. v. Latshaw, 374 Pa. 1, 97 A. 2d 234 (1953). ^{7/}

^{6/} Compare Lisi v. Alitalia-Linee Aeree Italiane, 253 F. Supp. 237, 241 (S.D. N.Y.), affirmed, 370 F. 2d 508 (C.A. 2), petition for certiorari pending, 35 L.W. 3356, where "conditions" in a mass of fine print about 1/2 the size of the crop mortgage print involved here, on the fourth page of an airline ticket, were held not to bind the passenger to the limitations on liability of the Warsaw Convention.

^{7/} See also Yerxa, Andrews & Thurston, Inc. v. Randazzo Macaroni Mfg. Co., 315 Mo. 927, 288 S.W. 20, 33 (1926).

Kenyon Farms, if reasonably diligent, would have noticed the clause covering Martindale's interest in crops grown on its lands. Therefore, it is liable for conversion. ^{8/}

CONCLUSION

The judgment of the district court should be reversed, with instructions to enter judgment for the United States.

Respectfully submitted,

CARL EARDLEY,
Acting Assistant Attorney General,

SYLVAN A. JEPPESEN,
United States Attorney,

Walter H. Fleischer

JOHN C. ELDRIDGE,
WALTER H. FLEISCHER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

AUGUST 1967

8/ In its answer (R. 21-22), Kenyon Farms raised several defenses to this action, other than its "fine print" objection. None are sound, and none were accepted by the court below. Kenyon Farms' main contention appears to be that it made advances to Martindale to assist him in growing crops on its lands, whereas the FHA did not, and that it therefore should be able to set off those loans, or that the Government somehow is "estopped" from holding appellee liable for conversion because of such loans to Martindale. However, a voluntary, unsecured advance by a landlord to his tenant gives him no rights against one who holds a lien on the tenant's crops. Goss v. Iverson, 72 Idaho 240, 238 P. 2d 1151 (1951). Nor is there any record evidence of inequitable conduct giving rise to an "estoppel". Moreover, the Government may not, in any event, be "estopped" by the conduct of its agents. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380.

CERTIFICATE

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Walter H. Fleischer
WALTER H. FLEISCHER

AFFIDAVIT OF SERVICE

CITY OF WASHINGTON
DISTRICT OF COLUMBIA

} ss.

WALTER H. FLEISCHER, being duly sworn, says:

That on August 22, 1967, he caused three copies of the foregoing brief for appellant to be served upon appellee by placing them in the United States Mail, air mail, postage prepaid, in an envelope addressed to counsel as follows:

Herman Bedke, Esquire
Burley, Idaho 83318

Walter H. Fleischer

WALTER H. FLEISCHER
Attorney,
Department of Justice,
Counsel for appellant.

Subscribed and Sworn to before
me this 22nd day of August, 1967.

[Seal]

Angeline Johns
NOTARY PUBLIC

My Commission expires April 14, 1972.

A P P E N D I X



"Exhibit C"

UNITED STATES DEPARTMENT OF AGRICULTURE
FARMERS HOME ADMINISTRATION

CROP AND CHATTEL MORTGAGE

(Idaho)

I, THIS MORTGAGE, made this 16th day of March, 1960, by Donald P. Martindale and Rachel O. Martindale of Cassia, Idaho, County of Cassia
(Post-office address)

State of Idaho, Mortgagee (hereinafter called the "Borrower"), is given to the United States of America acting through the Farmers Home Administration, United States Department of Agriculture, and its duly authorized representatives, Mortgagee (hereinafter called the "Government"), in consideration and to secure the payment of:

(1) The sum of thirteen thousand eighty-seven and 65/100 - - - dollars (\$ 13,087.65), (the unpaid principal remaining upon loan(s) made to or assumed by the Borrower) which debt(s) is (are) evidenced by (a) promissory note (s) or assumption agreement(s) given by the Borrower now held by the Government, as payee, in addition to interest on such note(s) or assumption agreement(s) as therein and to secure hereby, said note(s) or assumption agreement(s) being described as follows:

Principal Amount	Date	Last Installment Due
<u>5930.00</u>	<u>November 20 57</u>	<u>February 15</u>
<u>6730.00</u>	<u>February 26 19 59</u>	<u>December 15</u>
<u>1500.00</u>	<u>January 11 60</u>	<u>February 15</u>
	<u>19</u>	
	<u>19</u>	
	<u>19</u>	

and any first and successive extensions or renewals, in whole or in part, of any or all of such promissory note(s), or of any other obligations secured including interest thereon.

II. THE BORROWER does hereby mortgage to the Government, his interest in (a) all crops now standing, planted, sown, growing, or grown and that may be standing, planted, sown, growing, or grown within two (2) years after the date hereof, on the land described hereinafter, and on any other land owned, leased or controlled by the Borrower in the county(ies) identified hereinafter or in any other county(ies) in the State of IDAHO; and (b) the fixtures, all of which are located or to be located on the premises known as the W. B. Whiteley farm or ranch, located and approximately 1 1/2 miles in a Northly direction from the town or city of Cassia, in the county(ies) of Cassia, and State of IDAHO, said premises consisting of a certain parcel or parcels of land, situate, lying, and in the county(ies) of Cassia, and State of IDAHO, and more specifically described as follows:

W. B. Whiteley Lessor: Northeast Quarter of the Southeast Quarter of Section Sixteen, Township Thirteen South, Range Twenty-two East, Boise Meridian. Also corner at the Southeast corner of the Northwest Quarter of Section Twenty-eight, Township Thirteen South, Range Twenty-two East, Boise Meridian running thence West 60 rods, thence East 20 rods, thence South 64 rods to the place of beginning. Also the Northwest Quarter of the Southwest Quarter of Section Twenty-eight, Section Thirteen South, Range Twenty-two East, Boise Meridian;

NE 1/4 of Section Sixteen, Township 13 South, Range 22 East, Boise Meridian. Also SE corner of NE 1/4 of Section 23, Township 13 South, Range 22 East, Boise Meridian. Also NE 1/4 of Section 16, Township 13 South of Range 22 East, Boise Meridian.

NO. 21832

* * * * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

* * * * *

UNITED STATES OF AMERICA,)	
Appellant,)	
vs.)	<u>BRIEF OF APPELLEE</u>
KENYON FARMS, INC.,)	
Appellee)	

* * * * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

* * * * *

CARL EARDLEY Acting Assistant Attorney General,	HERMAN E. BEDKE Burley, Idaho
SYLVAN JEPPESEN, United States Attorney,	<u>Attorney for Appellee</u>
JOHN C. ELDRIDGE, WALTER H. FLEISCHER, Attorneys Department of Justice Washington, D. C. 20530	

Attorneys for Appellant

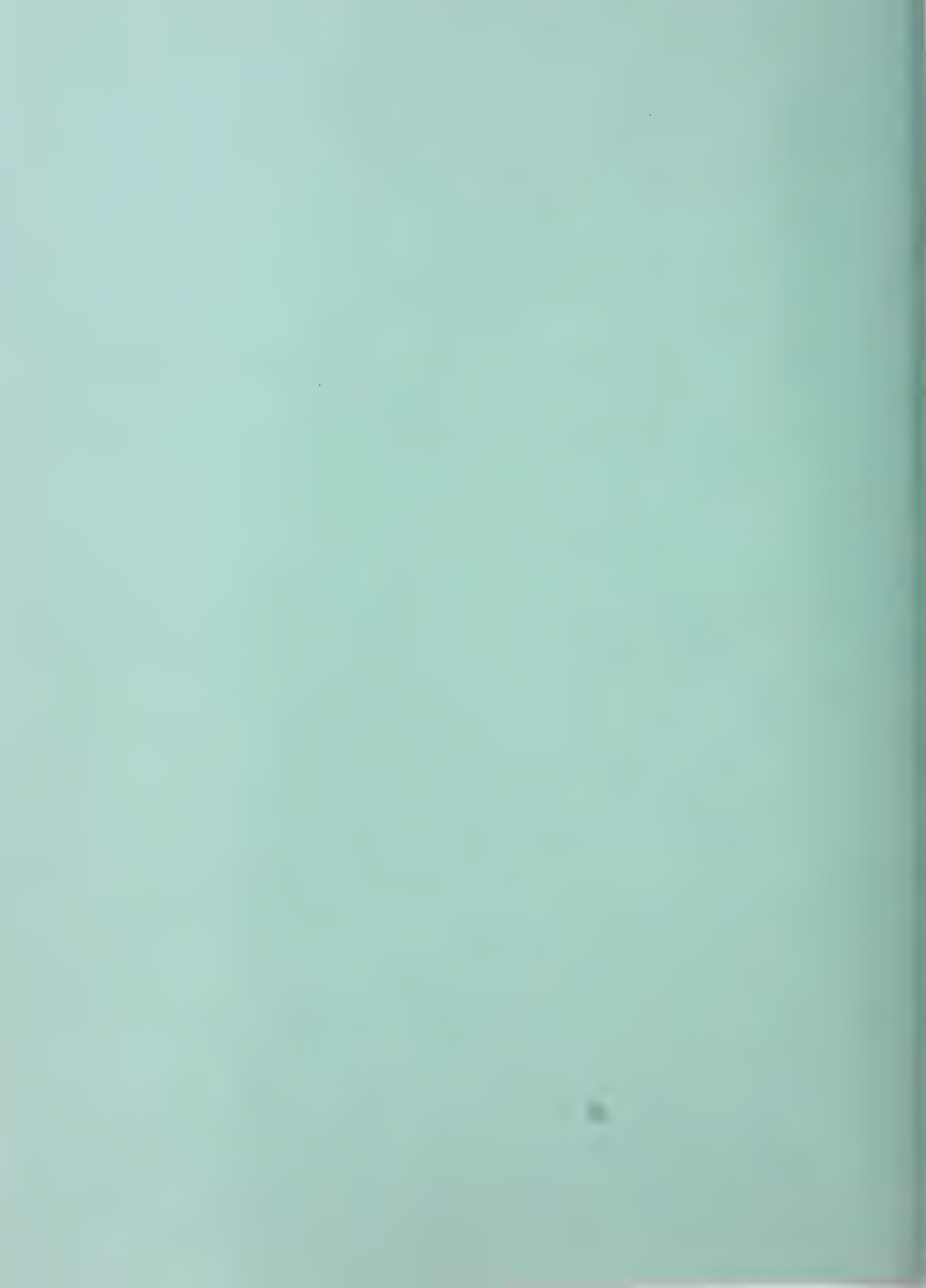
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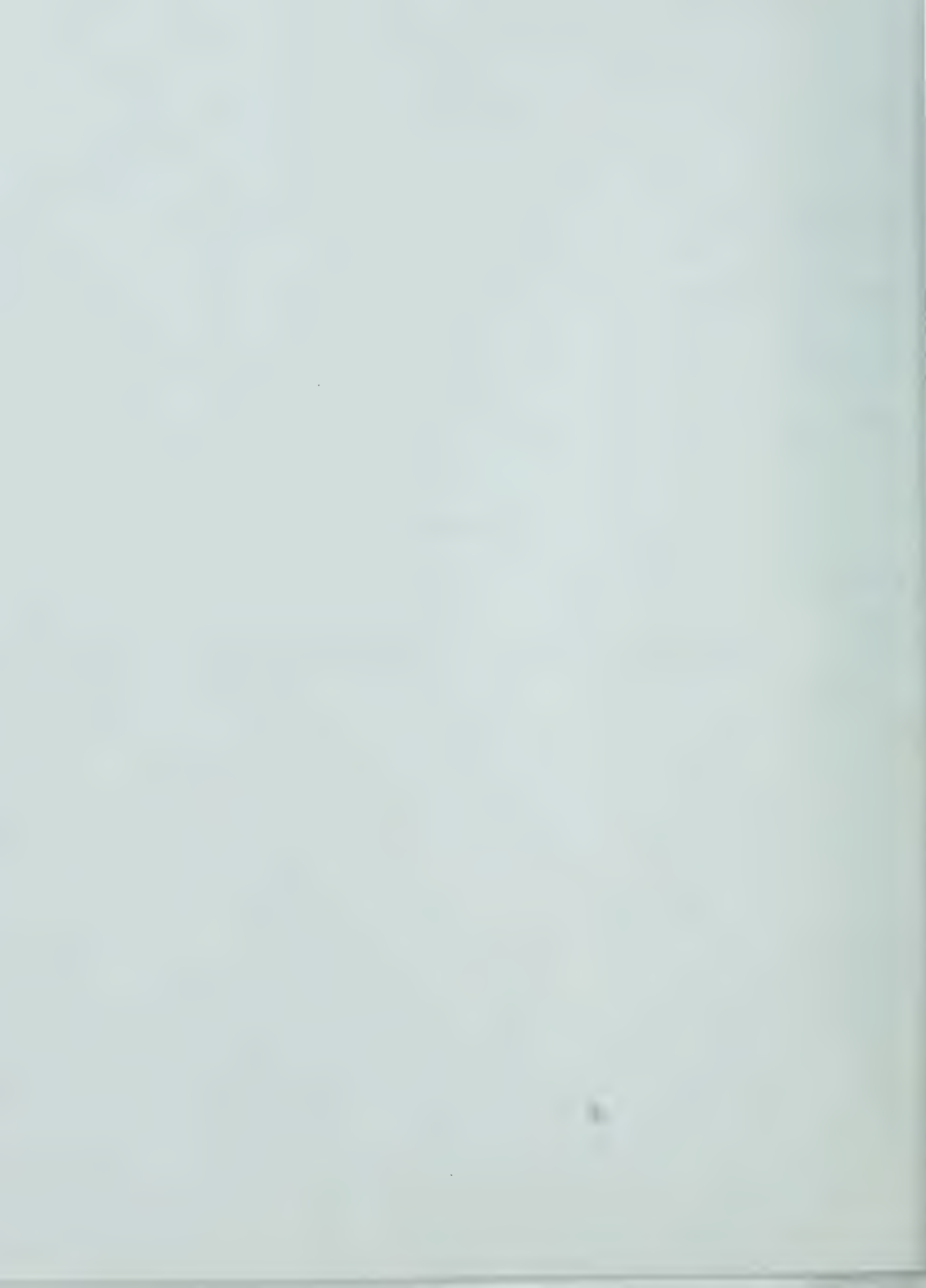
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STATEMENT OF ADDITIONAL FACTS



IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
)
Appellant,)
)
vs.)
)
KENYON FARMS, INC.,)
)
Appellee.)

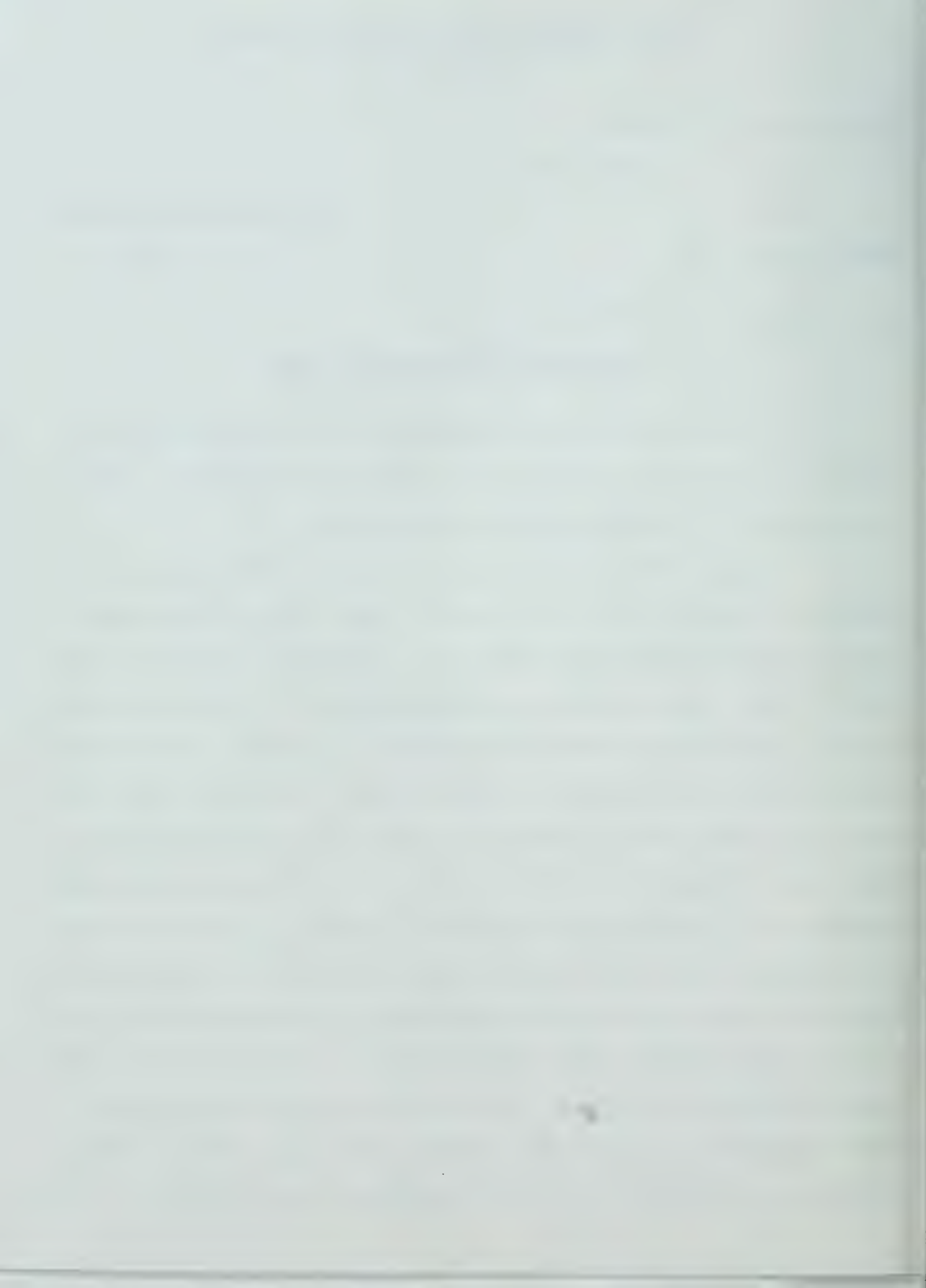
BRIEF OF THE APPELLEE

No. 21832

STATEMENT OF ADDITIONAL FACTS

In addition to the facts set out in the brief of the Appellant, the following facts must also be considered in order to receive a full picture of the transaction.

Kenyon Farms did not have a written lease of any description with Martindale during any of the time in controversy, although Kenyon Farms' President, W. B. Whiteley, personally had entered into a written lease with Martindale on a lease form furnished by the Farmer's Home Administration covering the lands in Cassia County as described in the mortgage. Martindale was a tenant on the farm owned by Whiteley in the same year and for the same cropping season of 1960 and 1961. W. B. Whiteley personally financed all of Martindale's farming operation in 1960 and 1961 and the consideration of the mortgage held by the Government was for an antecedent debt owed by Martindale on previous loans made to him by the Farmer's Home Administration, and the Farmer's Home Administration in the year 1960 and 1961, did not disburse any funds whatsoever in the production of the crops, either on the Whiteley property set out in the mortgage, or on the Kenyon Farms



property.

Notwithstanding the findings of the Court, and notwithstanding the answer of the Plaintiff, Mr. Whiteley's explanation at trial clearly discloses that he never at any time considered that Mr. Martindale was leasing any land from Kenyon Farms, but that Martindale was operating the land at Kenyon Farms for and on behalf of Whiteley personally.

The United States Government changed its form of mortgages in the year 1960 and 1962 providing therein the clause in the mortgage which is the subject of this litigation. Prior to that time, there was no such omnibus clause in the Government's mortgages.

The Government mortgage was filed, not recorded in the office of the County Recorder of Cassia County, and a person searching the records would necessarily examine the document actually filed rather than a typewritten transcription of the same.

SUMMARY OF ARGUMENT

A reasonable third party title searcher is not deemed nor expected to discover the description of property mortgaged when the same is contained in the fine print portion of the mortgage rather than in the filled in blank places set apart for that specific purpose.

Secondly, the description of the crops set out in the mortgage are insufficient to cover crops grown on the Kenyon Farms and such crops are not described with such particularity as required by law to give notice of the lien to a purchaser

ARGUMENT

There are two main questions involved in this case:

First, whether or not a reasonably diligent person would have taken notice of the clause in the Government mortgage wherein it attempted to cover all crops leased by the tenant, and

Secondly, whether or not the description of the property is sufficient to give a third party notice that there was a lien of the crops grown on lands owned by the Kenyon Farm, Inc.

It is significant to point out at the outset, that we are not concerned in this case of the validity of a hidden clause in a contract as it affects the two contracting parties, but rather the question here is whether or not a third party on diligent search of the records of the County, would be deemed to have received notice of the existence of the hidden clause, or be mislead by it. Therefore, the cases cited in the Appellant's brief dealing with construction of contracts between parties are not in point.

The mortgage filed was on a printed Government form furnished for Martindale's signature by the Government, and the blanks set out therein were filled in by the contracting parties with a typewriter prior to filing. The Government form used was new, in that it had not been used prior to 1960, but was used for the 1960 and 1961 crops in this area. Knowing that the instrument was a crop mortgage and its general legal effect

of being a lien on the property described, a reasonable diligent lien searcher would then look for three distinguishing features that would make this instrument different from any others like it, to-wit:

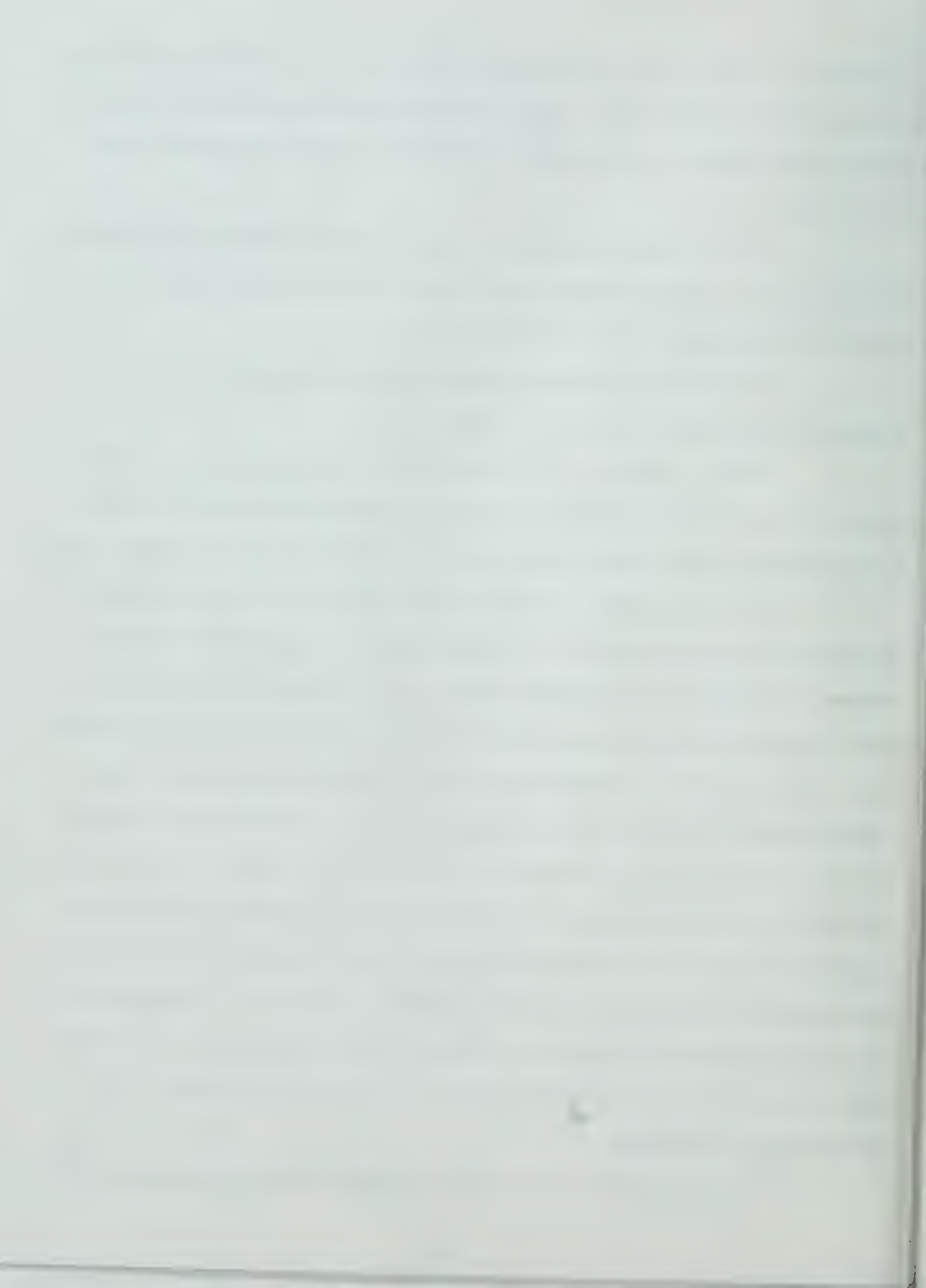
First, would be the parties involved. Which of course in this case is Blaine Martindale and his wife as Mortgagors, which was typewritten on the instrument.

Second, would be the amount of the mortgage, which was likewise typewritten upon its face.

Third, would be the description of the property mortgaged. This also was typed in particularly upon the face of the mortgage, being the crops grown on the Whiteley leased land.

No reasonable careful examiner would be required to read all the fine print and "boiler plate" paragraphs to determine if some other property was to be included in the mortgage, especially when particular property was typewritten thereon. Consequently, the distinguishing feature in any mortgage which makes it unique, distinctive and individual is the typewritten portion of the mortgage, and not the fine print printed thereon, and a third person would only be required to read the typewritten portions thereof which is the essential differentia and the distinguishing features of each mortgage. Consequently, the fine printed portion was a trap. This was especially true when the Government changed forms in this area the year this mortgage was recorded.

The Appellant has cited an Idaho case of longstanding,



Livestock Credit Corporation vs. Corbett, 21 Pac 2d, Page 874,
in support of their contention that the provisions similar to
those in the mortgage in question has had court approval in this
state. A careful reading of the said case discloses that it does
not support the Appellant's contention, but in fact, sets out a
rule of law which sets up the criterion of when a chattel or
property is sufficiently described therein as to constitute
notice to a third party.

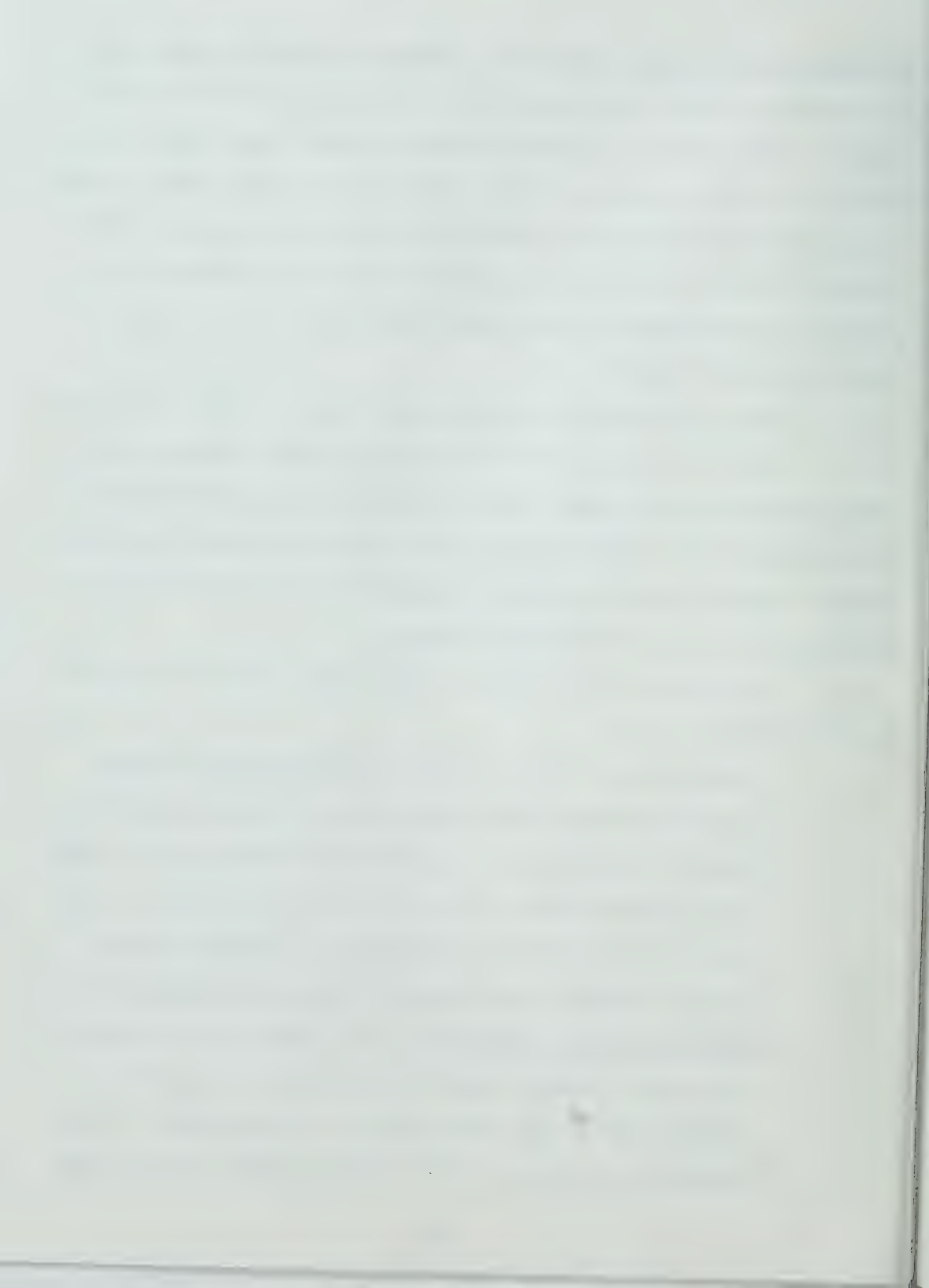
When applying the rule of that case to the facts here-
in, it leads to the only one conclusion that the chattels and
crops grown on Kenyon Farms were not sufficiently described in
the mortgage within the rule set out in the case, and for such
reason, did not constitute legal notice to a third party or to
Kenyon Farms, who purchased the crops.

The rule set out in the above cited case on Page 875
is as follows, to-wit:

"The general rule as to the sufficiency of chattel
mortgage descriptions, applicable to both objections
urged by appellant, is announced in McConnel vs. Lang-
don, 3 Idaho (Hasb.) 157, 163, 28 P. 403, 405 as fol-
lows: 'A description of property is sufficient if
it will enable a third person, aided by inquiries
suggested by the instrument, to identify the property.'"

The Idaho Supreme Court further said on Page 876:

"Coming now to the sufficiency of description in Res-
pondent's mortgages of the land on which the hay was



to be raised, an examination thereof discloses that they cover all that certain personal property now in the possession of the Mortgagor(s), in the county(ies) of Bannock, State of Idaho, described as follows: . . . also all hay grown or now growing, or to be grown, on all lands owned, leased or controlled, by the Mortgagor(s).'

It is therefore clear that such mortgages covered hay grown or to be grown on all land owned by the mortgagor in Bannock County. It is conceded that the hay in question was grown upon the Bancroft place in Bannock County, owned by the mortgagor. An examination of the county records would disclose the fact that the mortgagor was the owner of the land referred to as the Bancroft place, located in Bannock County, and appellant must have had actual knowledge of its ownership by the mortgagor by reason of the fact that his mortgage above referred to, given by the mortgagor, covered hay to be grown on such premises. The description set forth in the mortgages was such that a third person aided by inquiries suggested thereby, could identify the hay covered by the mortgage and the land on which it was raised." (Emphasis added)

It is significant to note that the Court placed great emphasis on the fact that the hay was grown upon the Bancroft Place in Bannock County owned by the mortgagor and such could be

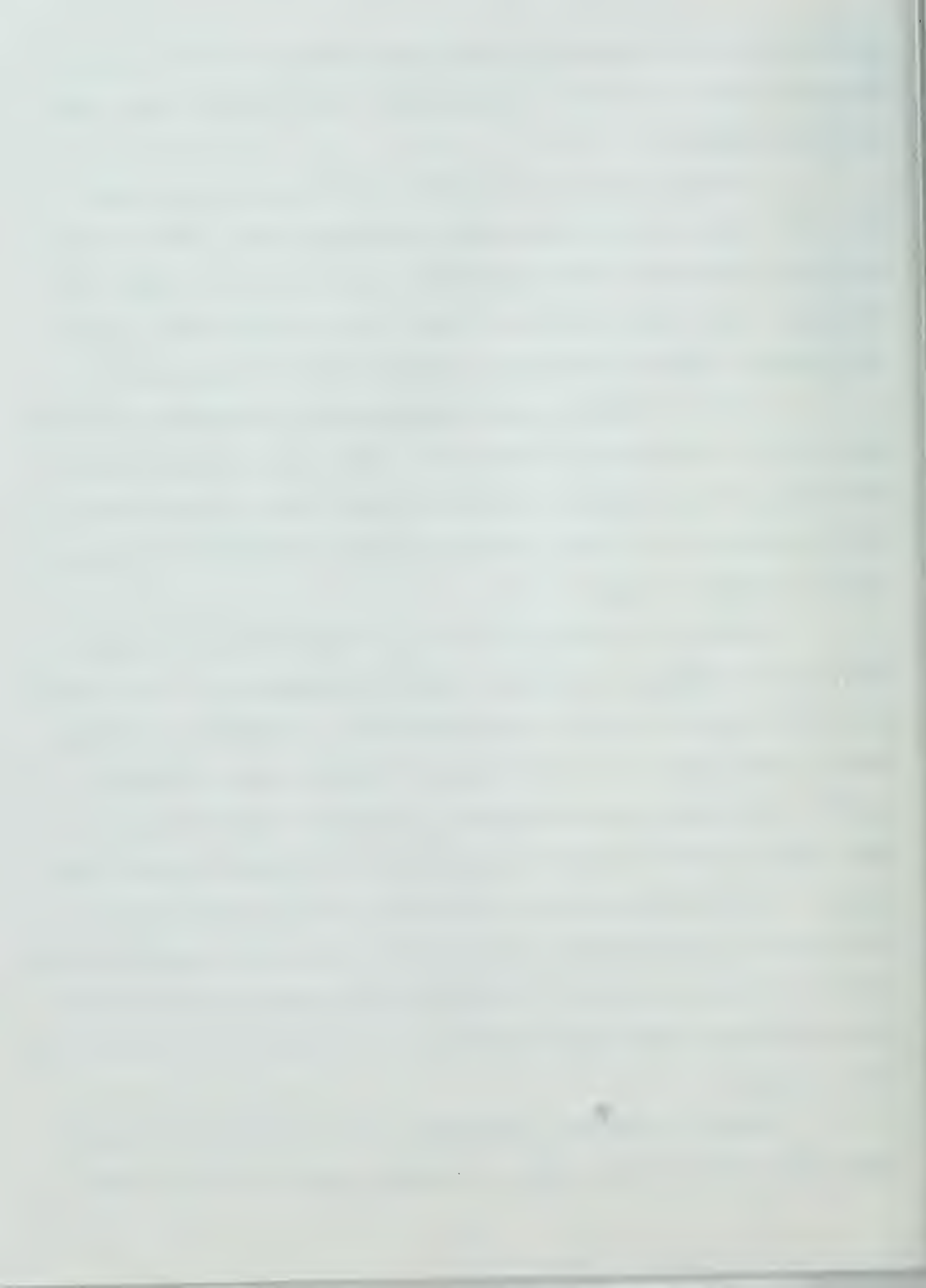
ascertained from the records, and the further fact that the First National Bank of Bancroft had a second lien upon the very same described property.

In the case at bar, we have an entirely different fact situation in that the crops in question were grown on Kenyon Farms which Martindale operated with no written lease arrangement. The important part of the rule of the Idaho case is the phrase "aided by inquiries suggested by the instrument".

In the Corbett case, the instrument suggested property owned by the Mortgagor and the Court stated that examination of the County Records would disclose the fact that the Mortgagor was the owner of the land referred to as the Bancroft Place located in Bannock County.

Now in the case at bar, in the application of this rule, let us examine the facts. What is suggested in the instrument itself which inquiries could be made to identify the property in question, i.e. crops grown on lands owned by Kenyon Farms? What could be obtained by a search of the records and what inquiry could be made? A search of the records would show that Mr. Martindale owned no other lands, or at least did not own the Kenyon Farms lands. So far as a lease is concerned, what would the records reveal? A search of the records would reveal nothing because there was no written lease made, and consequently none recorded.

There is nothing suggested in the property description which would lead a third party to identifying the crops grown



on Kenyon Farms. Certainly, Kenyon Farms and Martindale were complete strangers so far as any records were concerned. What then must a third party do further if he runs into a blind alley so far as written instruments are concerned? The rule does not require any searches or inquiries outside the filing or recordings in the Court House. Certainly, the only suggestion of any lease in existence is the written lease with Whiteley personally, described in the mortgage itself. This itself would divert any further inquiries to ascertain if Martindale had an oral lease on some other property in the county. The enumeration and setting out specific property precludes other property not mentioned. But even if further inquiries were required, what would be the result? Any third party asking Mr. W. B. Whiteley, President of Kenyon Farms, whether or not there was an oral lease, would have received the answer "no" because Mr. Whiteley maintained throughout the trial that Mr. Martindale had no such lease with Kenyon Farms. What would an inquiry of Blaine Martindale himself reveal? As set out on Page 9 in the brief of the Appellant, Blaine Martindale at the trial concluded that "the mortgage seemed to cover everything that I would operate", not that it did. Even in his expression, there was a slight doubt as to just exactly what was covered by the mortgage.

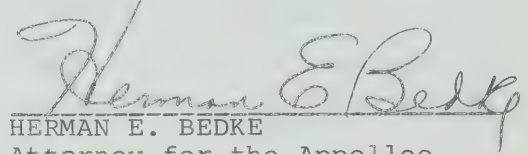
We submit that the description of the mortgaged property would give a clue to absolutely no further inquiries and for that reason, under the strict interpretation and rule of law of the Corbett case, the description was fatally defective

and void as against the Appellee.

CONCLUSION

The Conclusion of Law and Judgment of the District Court should be affirmed in all respects.

Respectfully submitted,


HERMAN E. BEDKE
Attorney for the Appellee

CERTIFICATE

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


HERMAN E. BEDKE

AFFIDAVIT OF SERVICE

STATE OF IDAHO)
 :SS
County of Cassia)

HERMAN E. BEDKE, being duly sworn says:

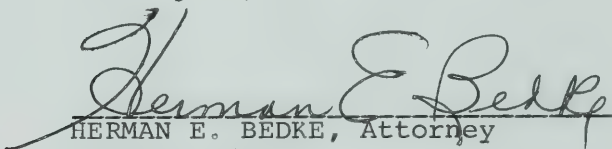
That on September 29, 1967, he caused copies of the foregoing brief for Appellee to be served upon Appellant by placing them in the United States Mail, air mail, postage prepaid, in an envelope addressed to counsel as follows:

Three copies to: CARL EARDLEY
 Acting Assistant Attorney General
 Department of Justice
 Washington, D. C. 20530

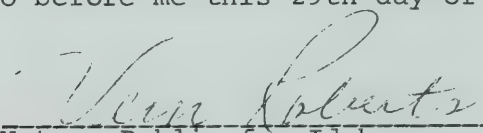
One copy to: Sylvan A. Jeppesen
 United States Attorney
 Boise, Idaho 83701

One copy to: John C. Eldridge
 Attorney
 Department of Justice
 Washington, D. C. 20530

One copy to: Walter H. Fleischer
 Attorney
 Department of Justice
 Washington, D. C. 20530


HERMAN E. BEDKE, Attorney
Burley, Idaho
Counsel for Appellee

SUBSCRIBED AND SWORN to before me this 29th day of September, 1967.


Notary Public for Idaho

My Commission expires: March 22, 1970.









